CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN, PETITIONER,

vs.

R. J. HOAGE, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED JUNE 21, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

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vs.

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[fol. 1] [Caption omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Holding an Equity Court

Equity

No. 57401

ISAAC CHAPMAN, Plaintiff,

vs.

R. J. HOAGE, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, Defendant

BILL FOR MANDATORY INJUNCTION

Filed July 11, 1934

The bill of complaint of the plaintiff respectfully shows to the Court as follows:

1. That the plaintiff is an adult citizen of the United States and a resident of the District of Columbia and brings this suit in his own right.

2. That the defendant, Robert J. Hoage is a citizen of the United States and is sued as Deputy Commissioner for the District of Columbia Employees' Compensation Commission.

3. That said plaintiff was on, to-wit, the 15th day of December, 1928, and for eight months prior thereto, in the continuous employ of the Palais Royal, Inc., a corporation, as a "helper" on a delivery truck operated by said corporation.

4. That during the time of plaintiff's employment aforesaid the said Palais Royal, Inc., a corporation, was subject to an Act of Congress, approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes" and that the

liability of the said Palais Royal, Inc., a corporation, as employer, for compensation under said Act was insured by the Indemnity Insurance Company of North America.

[fol. 2] 5. That while so employed by the Palais Royal, Inc., as aforesaid on, to-wit, December 15th, 1928, the plaintiff was riding on a truck belonging to the employer when the said truck collided with a street car of the Washington Railway and Electric Company causing the truck in which the claimant was riding to turn over, and as a result thereof the plaintiff suffered severe cuts and bruises on the head and the toes on one foot were crushed.

6. That on the 10th day of June, 1929, the plaintiff filed with the defendant a notice on a form prescribed by the United States Employees' Compensation Commission, of his election to sue the Washington Railway and Electric Company, the third party, and that in filing said form the plaintiff made claim for any deficiency between the amount recovered from the Washington Railway and Electric Company and the amount to which he might be entitled under the said Compensation Act, thereby protecting his rights against the statutory limit as provided in said Act.

7. That on the 18th day of July, 1929, the plaintiff instituted suit against the Washington Railway and Electric Company, a corporation, Law No. 76,949, that on the trial of the issues in said case the plaintiff obtained a verdict of Three Thousand Dollars ($3,000.00) against said third party, which said judgment was reversed by the Court of Appeals, and in which last mentioned judgment the plaintiff sought a review in the Supreme Court of the United States, which plaintiff says was denied; that said case was returned to the Supreme Court of the District of Columbia, for further proceedings.

8. That on March 1, 1934, application was made of the defendant by the plaintiff for compensation for disability [fol. 3] under the compensation Act, (Exhibit A) and the employer after due notification filed with the defendant an answer, a copy of which is annexed hereto marked "Exhibit B", and prayed to be prayed as a part hereof. Thereafter on the 26th day of April, 1934, a hearing was held, at which time objection was made to the hearing by the attorney appearing for the employer on the grounds that the case of

the plaintiff against the third party had not been concluded and the defendant was without jurisdiction. Thereupon the hearing was continued infefinitely.

9. That said plaintiff through his attorneys, on the 3rd day of May, 1934, filed a motion for leave to proceed further in the Supreme Court of the District of Columbia, Law No. 76,949, without the payment of cost, (Exhibit C), alleging his indigency and inability to pay accrued Court cost. Thereafter on the 9th of May, 1934, said motion came on for hearing before Mr. Justice Bailey, who refused to grant the same but advised counsel for said plaintiff that by dismissing said law suit, the claim of this plaintiff could properly and legally be considered by the defendant.

10. Thereupon said plaintiff being unable to proceed further with said cause to a final disposition of the same, on advice of and through his attorneys, discontinued said action against said third party.

11. That after application made, another hearing was held on the 8th day of June, 1934, before the defendant, and testimony taken as to the extent and character of said plaintiff's injuries and the degree of incapacity and disability during the period between the date of the accident and the date of this hearing.

12. As a result of said hearing the defendant filed a compensation order on June 27, 1934, rejecting the claim of the plaintiff, a copy of which is annexed hereto marked "Exhibit D" and prayed to be read as a part hereof.

[fol. 4] 13. The Plaintiff is informed and believes and expects to prove that the defendant erred in his conclusions from the facts, as found by him in the law applicable thereto and in the order based thereon as follows:

(a) In finding that the plaintiff had abandoned his suit against the third party.

(b) In finding that the suit of the plaintiff against the third party was dismissed because of failure on the part of the plaintiff to prosecute.

(c) In finding that the plaintiff having filed his election to pursue his remedy against the third party failed to pursue it against said third party to completion.

(d) In finding that the rights of the employer had been prejudiced by any act of commission or omission on the part of the plaintiff.

(e) In finding that the plaintiff allowed the statutory limit to run against any rights the employer might have had.

(f) In not applying in favor of the plaintiff the presumption accorded him under Section 20(a) of said Act.

(g) In finding that the claimant was not entitled to compensation within the meaning of said Act.

(h) In failing to make a finding for the plaintiff on the whole case and failing to accord him compensation.

Wherefore, in consideration of the premises, plaintiff prays:

1. That a writ of subpœna be issued by this Court against said defendant, Robert J. Hoage, as said Deputy Commissioner, requiring him by a day certain to be therein named, to appear and answer the exigencies of this bill of complaint.

2. That the proceedings before said Deputy Commissioner be reviewed by this Court as to the conclusion of law therein [fol. 5] contained, and as to the facts and conclusions of fact that may be within the jurisdiction of this court; and that a proper decree be granted plaintiff as he may in law be entitled.

3. That an injunction issue out of this Court requiring the defendant to set aside the Compensation Order of June 27, 1934, and to proceed to award compensation to the plaintiff within the terms of the Act and pursuant to the record of testimony in this cause.

4. For such other and further relief as to the Court may seem meet and proper.

Isaac Chapman, Plaintiff; Harlan Wood, J. P. Donovan, Attorneys for Plaintiff.

Duly sworn to by Isaac Chapman. Jurat omitted in printing.

Let this petition be filed without prepayment of costs.
7/11/34. O. R. Luhring, Justice.

[fol. 6] PLAINTIFF'S EXHIBIT "A"

March 1, 1934.

Employees' Compensation Commission,
Ouray Building,
Washington, D. C.

Attention Mr. Cochran.

DEAR MR. COCHRAN:

Reference is made to the claim of Isaac Chapman, who was injured on December 15, 1928, at the intersection of 4½ Street and Main Avenue, S. W.

July 18, 1929, Isaac Chapman brought suit in the Supreme Court of the District of Columbia, against the Washington Railway and Electric Company, Law No. 76,949. A trial was had and a judgment based upon a verdict of a jury, of $3,000.00 was obtained by Chapman.

The defendant appealed to the Court of Appeals of The District of Columbia, case No. 57,39. On May 8, 1933, the Court of Appeals reversed the judgment of the Supreme Court in favor of Chapman. In due season, an application for a Writ of Certiorari was made to the Supreme Court of the United States for the purpose of reversing the judgment of the Court of Appeals. On October 9, 1933, the Supreme Court of the U. S. denied Chapman's application for Writ of Certiorari, thereby affirming the judgment of the Court of Appeals. Consequently, Chapman has not received any compensation whatsoever, although, I may say that he is still unable to work due to the injuries he received in the accident.

At the time of the accident, Chapman was receiving $18.00 per week as an employee of the Palais Royal, Incorporated.

On behalf of Chapman under the appropriate provisions of the Workman's Compensation Act, application is hereby made for compensation under the same, in view of the fact that in his proceedings in Court, no recovery has been had.

Respectfully submitted, Harlan Wood.

[fol. 7] PLAINTIFF'S EXHIBIT "B"

Leave This Space Blank

Case No. ——.
Insurance Carrier's No. ——.

Form DCCA-315.

District of Columbia Workmen's Compensation Act

Office of Deputy Commissioner,

Washington, D. C.

Answer of Employer or Insurance Carrier to Employee's Claim for Compensation

ISAAC CHAPMAN, Claimant

vs.

PALAIS ROYAL, INC., Employer

Indemnity of N. A., Insurance Carrier

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that claimant sustained an injury on or about the date set forth in the claim.

2. It is admitted that both the employer and employee were subject to the District of Columbia Workmen's Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of the injury.

4. It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that due notice of injury was given employer.

6. It is denied that claimant was permanently disabled to the extent stated in claim.

7. It is denied that claimant was disabled for the period stated in claim.

8. It is admitted that the rate of wages as set forth in claim is correct.

9. —— ——.

[fol. 8] Frost, Myers & Towers. Signed by —— ——.

Note: The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the de-uty commissioner and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

PLAINTIFF'S EXHIBIT "C"

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law

No. 76,949

ISAAC CHAPMAN, Plaintiff,

vs.

WASHINGTON RAILWAY & ELECTRIC CO., Defendant

Motion for Permission to Proceed Further in the Above Entitled Cause

Comes now the plaintiff, Isaac Chapman, by his attorneys of record and moves the Court for permission to proceed further in the above entitled cause without the payment of accrued or further costs and states as cause therefore as follows; that the plaintiff secured a judgment in this Court on the issues raised herein and that said judgment was set aside by the Court of Appeals of the District of Columbia and the case remanded to this Court for further proceedings; that under the opinion as handed down by the Court of Appeals, said plaintiff would be stopped from obtaining a judgment in his favor in any future proceedings; that at the time of the injury complained of in the declaration filed herein, the plaintiff was covered by and subject to the provision of the Workman's Compensation Act in force in and for the District of Columbia; that since the action of the Court of Appeals, he has filed claim for compensation under [fol. 9] the provisions of the Act hereinbefore referred to

with the Deputy Commissioner of the United States Compensation Commission in and for the District of Columbia; that at a hearing held before said Deputy Commissioner on the 26th day of April, 1934, it was held that said palintiff herein had not exhausted his remedy at law and that accordingly, the Commissioner was without jurisdiction to proceed with an adjudication of his claim until such time that this suit was finally terminated; that as a result of the injuries complained of by the plaintiff, resulting from the accident on which this action was predicated, he had been unable to be employed for any length of time and that during said period, he has earned less than $100.00; said plaintiff is still incapacitated and is unemployed and is without funds with which to pay the costs that have accrued in this action or any future costs as stated in the affidavit of the plaintiff appended hereto; that for the purpose of having this cause determined as a matter of record, your plaintiff prays for permission to proceed as hereinbefore stated.

—— ——, —— ——, Attorneys for Plaintiff.

Service of copy of foregoing motion acknowleged this — day of May, 1934.

—— ——, —— ——, Attorneys for Defendant.

[fol. 10] PLAINTIFF'S EXHIBIT "D"

United States Employees' Compensation Commission
District of Columbia Compensation District

Compensation Order—Rejection of Claim.

Case No. 285-14

In the Matter of the Claim for Compensation Under the District of Columbia Workmen's Compensation Act

ISAAC CHAPMAN, Claimant

vs.

THE PALAIS ROYAL, INC., Employer

INDEMNITY INSURANCE COMPANY OF N. A., Insurance Carrier

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing

having been duly held in conformity with law, the Deputy Commissioner makes the following:

Finding of Fact

That on the 15th day of December, 1928, the claimant above-named was in the employ of the employer above-named whose address is 11th and G Streets, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled an "Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Indemnity Insurance Company of North America; that on said date the claimant herein while in the employ of the employer above named as a helper on a truck sustained personal injury which arose out of and occurred in the course of his employment and resulted in his disability; that while the claimant was so employed he was riding on a truck be- [fol. 11] longing to the employer when the said truck collided with a street car of the Washington Railway and Electric Co., causing the truck in which the claimant was riding to turn over; that as a result thereof the claimant suffered severe cuts and bruises on the head and the toes on one foot were crushed; that on the 10th day of June, 1929, the claimant herein filed with the Deputy Commissioner notice on a form prescribed by the Commission of election to sue the third party; that in filing said form the claimant made claim for compensation for any deficiency between the amount recovered from the third party and the amount to which he might be entitled under the compensation act, thereby protecting his rights against the statutory limit as provided in Section 13 of the Act; that the claimant pursued his rights of election in the Supreme Court of the District of Columbia and the case was carried from there to the Court of Appeals where the claimant's contention was denied; that a writ of certiorari was applied for and denied by the Supreme Court of the United States; that the claimant then appeared before the Deputy Commissioner by counsel and made request for a hearing and made formal claim for compensation under the provisions of the compensation act, and the Deputy Commissioner was advised by the attorney for the claimant on March 1, 1934,

that application was being made for compensation for disability under the compensation act; that the employer was duly notified of such application and at the original hearing held before the Deputy Commissioner, the insurance carrier herein denied the jurisdiction of the Deputy Commissioner to hear the case on the ground that the claimant had not pursued and exhausted his third party remedy; that the case had been remanded for further action to the Supreme Court of the District of Columbia, on the ground of error assigned as a result of the original trial; that the [fol. 12] claimant did not pursue his third party remedy in the Supreme Court to its completion and the rights of the employer to subrogation of action were irrevocably prejudiced thereby; that the claimant having abandoned the case and action being dismissed because of failure on the part of the claimant to prosecute, the statute of limitations precludes the employer and insurance carrier from pursuing their subrogated rights.

It is found that the claimant by his action in not pursuing his remedy against the third party to its completion within the statutory limit has thereby prejudiced the rights of and precluded the employer from taking such action as is provided in the compensation law. Based upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for compensation be, and it hereby is rejected for the following reason:

1. That the claimant, having filed his election to pursue his remedy against the third party and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had and the claimant therefore is not entitled to compensation within the meaning of the Act.

Given under my hand at Washington, D. C., this twenty-seventh day of June, 1934.

R. J. Hoage, Deputy Commissioner, District of Columbia Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, the attorneys for the

claimant, and the attorney for the insurance carrier, at the last known address of each as follows:

[fol. 13] Name	Address
Mr. Isaac Chapman,	52 Quincy Street, N. W., Apt. 1, Washington, D. C.
The Palais Royal, Inc.,	11th and G Sts., N. W., Washington, D. C.
Indemnity Insurance Company of N. A. C/o	Ralph W. Lee & Company, 1508 L Street, N. W., Washington, D. C.
Mr. Frank H. Myers,	801 Hibbs Building, Washington, D. C.
Mr. Harlan Wood,	201-5 McLachlen Building, Washington, D. C.
Mr. James P. Donovan,	1001 15th Street, N. W., Washington, D. C.

Mailed June 27, 1934. R. J. Hoage, Deputy Commissioner.

Memorandum

July 11, 1934.—Plaintiff's Affidavit in Forma Pauperis —filed.

[fol. 14] PLAINTIFF'S EXHIBIT "E"

BEFORE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION FOR THE DISTRICT OF COLUMBIA

Before Hon. R. J. Hoage, Deputy Commissioner for the District of Columbia

No. 285-14

ISAAC CHAPMAN, Claimant,

vs.

THE PALAIS ROYAL, INCORPORATED, Employer,

and

THE INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier

Transcript of Testimony at Hearing

Pursuant to notice, this matter was heard before Honorable R. J. Hoage, Deputy Commissioner, United States Em-

ployees' Compensation Commission, at Washington, D. C., on the 26th day of April, 1934, at ten o'clock a. m.

Appearances:

Isaac Chapman, the claimant, in person;
James P. Donovan, Esquire, on behalf of the claimant;
Frank Myers, Esquire, on behalf of the respondent.

[fol. 15] COLLOQUY

The Deputy Commissioner: This is the case of Isaac Chapman, the claimant, versus The Palais Royal, Incorporated, the employer, and the Indemnity Insurance Company of North America, the insurance carrier.

Having been formally set for hearing, the case is presented for consideration at this time.

The parties present are:

Isaac Chapman, the claimant. Is he here?

The Claimant: Yes, sir.

The Deputy Commissioner: Represented by Attorney James P. Donovan.

The witnesses in behalf of the claimant are Doctor Arthur B. McKinney——

Dr. McKinney (interposing): Here.

The Deputy Commissioner: The X-ray plates of Doctors Groover, Christie, and Merritt.

A Witness: Yes, I am Doctor McPeak.

The Deputy Commissioner: Are they all the witnesses you have?

Mr. Donovan: Yes.

The Deputy Commissioner: Representing the respondent is Mr. Frank Myers, assisted by Mr. King.

The witness on behalf of the respondent is Doctor Hall. He will be here at ten-thirty.

Mr. Myers: And Doctor Edward Larkin.

[fol. 16] The Deputy Commissioner: This record shows that the claimant alleges to have been injured on December 15, 1928, and that on the 10th day of June, 1929, notice of election to sue was filed by the claimant in the office of the Deputy Commissioner on the form prescribed by the Deputy Commissioner for that purpose, signifying that the claimant had elected to bring action against the third party, the Washington Railway and Electric Company, and made claim at that time for any deficiency in the amount of com-

pensation recovered under the third-party election; and the claim was carried to the Supreme Court of the District of Columbia and from there to the Court of Appeals. A writ of certiorari having been denied by the Supreme Court of the United States, the case now stands reversed by the Court of Appeals, and the claimant is now appearing before the Deputy Commissioner, making a claim for compensation under the District of Columbia Workmen's Compensation Act.

Claim for compensation was filed on December 17, 1929—that is the formal claim on the form prescribed by the Commission—in which the claimant alleges to have sustained an injury on the 15th day of December, 1928, at four-ten o'clock p. m., as a result of a collision between a truck, on which he was working, and a street car, and he alleges to have suffered a slight concussion of the brain, broken bones of the right foot, bruises and abrasions, and a permanent scar on the forehead, due to a deep laceration, and he further states that he was compelled to stop work on [fol. 17] December 15, 1928. He alleges that his wages were eighteen dollars a week, working six days a week.

Mr. Myers, you are representing the respondent?

Mr. Myers: Yes, sir.

The Deputy Commissioner: Will you admit that the Palais Royal was subject to the provisions of this Act at the time of the alleged injury?

Mr. Myers: Yes.

The Deputy Commissioner: Do you admit that the claimant was in the employ of and rendering service for the employer on that date?

Mr. Myers: Yes, sir.

The Deputy Commissioner: Will you admit that the employer had due notice of an injury?

Mr. Myers: Yes, sir.

The Deputy Commissioner: You do admit that the wages were eighteen dollars a week, working six days a week?

Mr. Myers: I believe that is correct. Of course, he was not employed by us except for a short period of time.

The Deputy Commissioner: That was admitted in the form by the insurance company.

Mr. Myers: Yes.

The Deputy Commissioner: May I ask, Mr. Donovan, what period of disability you are making claim for or are you willing to have that established by the evidence?

[fol. 18] Mr. Donovan: I think I had better do that.

The Deputy Commissioner: You are making claim for temporary total disability and permanent partial disability?

Mr. Myers: Do I understand that no date has been established as to when they are entering this claim for?

Mr. Donovan: Our claim is that the disability started from the date of the accident and, of course, he is still partially disabled at the present time.

The Deputy Commissioner: He is waiting to establish his present total disability by evidence, so you are denying temporary total or permanent disability?

Mr. Myers: We deny any disability.

The Deputy Commissioner: You are denying permanent partial disability as a result of the injury?

Mr. Myers: Yes.

The Deputy Commissioner: Have you any other denials?

Mr. Myers: I raise the question of the jurisdiction of the Deputy Commissioner to hear this case, on the ground that the claimant has not pursued and exhausted his third-party remedy. In other words, although the case was turned down by the Court of Appeals, it was remanded for further action, and such further action was not taken.

The Deputy Commissioner: You have a decree of the Court remanding it for further trial?

Mr. Myers: For further trial in the Supreme Court of [fol. 19] the District of Columbia, based upon a reversal on the ground of error assigned as a result of the original trial.

It is our position that if he does not pursue his third-party remedy to its completion he irrevocably prejudices the rights of the employer to a subrogation of the action, because having abandoned the same and the action being dismissed by failure to prosecute, the statute of limitation precludes us from pursuing our rights.

He has not definitely determined during this period of time whether there is any way he can obtain recovery from the third party.

It was remanded by the action of the Court of Appeals. Now he comes here and elects to pursue the course of the Compensation Law and abandon his third-party claim, and he definitely prejudices that subrogee's action against it.

Unless he can come in here and show definitely by proof from the Court that he has returned to the Supreme Court

of the District of Columbia in accordance with the directions of the mandate of the Court of Appeals and pursued his action there, so as to have it definitely determined there if he has any remedy, and to attempt further action against the third party, he has no right to come in here now.

The Deputy Commissioner: The action was brought against the railway company, was it?

Mr. Myers: That is correct.

[fol. 20] The Deputy Commissioner: As I understood it from the file of the Deputy Commissioner, the case had been completed by the Court of Appeals, but no decree had been handed down remanding it for further hearing, and in lieu of that fact a writ of certiorari was applied for and the Supreme Court of the United States denied the writ.

Mr. Donovan: My recollection of the opinion is—I haven't got a copy—that it was remanded.

The Deputy Commissioner: Do I understand that the claimant failed to make use of his rights under the decree of the Court?

Mr. Donovan: The opinion of the Court was such that it absolutely barred us from that. It held that he was guilty of contributory negligence on the evidence adduced at the trial, which held that there was no negligence on the part of the railroad and which held that he failed to make out a prima facie case and could not recover, since the only witness that we had was Parker, who was the driver of the truck, had since died, and without his testimony at the time this case was submitted, naturally, we had no further redress against the railroad company. We could not proceed further in the Supreme Court of the District of Columbia. However, on the opinion of the Court of Appeals of the District, if they followed the dictum of the Court, the Court must have denied a verdict for the plaintiff in this action.

[fol. 21] Mr. Myers: Of course, on the face of the record it shows that the Court of Appeals, having heard it and having reversed it on certain errors of the first trial, has remanded it to the Supreme Court; and it appears to me that they should have gone down, even with the facts stated by Mr. Donovan; they should have gone down and exercised their rights to conclusively settle their remedy.

I do not want to take advantage of Mr. Donovan this morning, but——

Mr. Donovan (interposing): I must say that in part I am forced to agree with you.

The Deputy Commissioner: Let me ask you this: The judgment is reversed and the case is remanded for further proceedings. Is it possible that that further proceeding might give the claimant the discretion of carrying the case into court or bringing it before the Deputy Commissioner?

Mr. Myers: That had no consideration by them. Other than the facts of the trial below they did not have anything about the Compensation Law. It does not enter into the case; there wasn't an item of it in the case. They remanded it for further proceedings in the court below.

It is my opinion that they should have taken such action to definitely conclude their rights of election, but now they come in here.

The Deputy Commissioner: What course would be pur-
[fol. 22] sued to clear up the situation and leave it free to be brought before this office?

Mr. Myers: They could go down and ask for a new trial. They can either have the judgment entered against the defendant with cause, as instructed by the mandate of the Court of Appeals, or they can ask for a new trial and go upon those facts, evolving upon those facts sufficient presentation for a new jury.

The Deputy Commissioner: In abandoning their rights before the Court, as it stands, they have prejudiced the rights of the employer?

Mr. Myers: They have cut off the right of subrogation. The three-year period has run out. They come in here and they may have a hearing and a certain award may be made and compensation awarded, and our subrogation rights are cut off. We have no standing in court, because our rights are based upon the statute of limitations.

(At this point an informal discussion was had, which, upon the order of the Deputy Commissioner, was not recorded.)

The Deputy Commissioner: I think I shall have to continue the case indefinitely, until that question is settled. Whenever you advise me that the case is perfectly clear of court procedure and make a request for a further hearing, I will be glad to hear it.

(Thereupon the instant hearing was concluded.)

[fol. 23] I hereby certify that the foregoing is a complete and accurate transcript of the shorthand report of the proceedings had and testimony presented at the described hearing, made by Nicholas Cinciotta, a competent shorthand reporter and a member of my staff.

H. S. Middlemiss, Official Reporter.

[fol. 24] PLAINTIFF'S EXHIBIT "F"

BEFORE UNITED STATES EMPLOYERS' COMPENSATION COMMISSION FOR THE DISTRICT OF COLUMBIA

Before Hon. R. J. Hoage, Deputy Commissioner for the District of Columbia

No. 285-14

ISAAC CHAPMAN, Claimant,

vs.

THE PALAIS ROYAL, INC., Employer,

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier

Transcript of Testimony at Hearing

Pursuant to notice, this matter was heard before Honorable R. J. Hoage, Deputy Commissioner, United States Employees' Compensation Commission, at Washington, D. C., on June 8, 1934, at 2 o'clock p. m.

Appearances:

Mr. Isaac Chapman, the Claimant, in person;
James P. Donovan, Esq., on behalf of the Claimant;
Frank Myers, Esq., on behalf of the Respondent.

[fol. 25] COLLOQUY

The Deputy Commissioner: This is the case of Isaac Chapman, the Claimant, vs. The Palais Royal, Inc., the employer, and the Indemnity Insurance Company of North America, the insurance carrier.

Having been formally set for hearing, the case is presented for consideration at this time.

A hearing was attempted on the case on April 26, 1934, in which case counsel for the respondent denied the jurisdiction of the Deputy Commissioner in holding the hearing, and the facts were also developed that the case had not been dismissed from the court, where it had been presented for a third party action. The facts pertaining to this are recorded in the transcript of April 26, 1934, which is made a part of the record in this case.

The parties present are:

Isaac Chapman, the Claimant, appearing in person, and represented by Attorney James P. Donovan; and

Frank Myers, representing the respondent.

Do you want to state something, Mr. Donovan?

Mr. Donovan: I just want to say, for the record, that at the prior hearing we said that we were going to attempt to prove partial permanent disability to date. Mr. Myers and I agreed to stipulate that the claimant has been earning $20 a week for the last ten months.

The Deputy Commissioner: All right. For the last ten months ending when?

Mr. Donovan: Ending today.

[fol. 26] The Deputy Commissioner: That is in excess of what he was earning at the time of the injury?

Mr. Myers: That is correct.

The Deputy Commissioner: With that stipulation do I understand that temporary total disability would terminate ten months prior to this date?

Mr. Donovan: Yes, sir; that is correct.

The Deputy Commissioner: That would be August 8th?

Mr. Myers: Yes, August 8th. We will say August 7th, then.

Mr. Donovan: All right.

The Deputy Commissioner: Is there any doubt about the nature of the injury, Mr. Myers?

Mr. Myers: There is no doubt about the fact that this man received injuries and although we stipulated with Mr. Donovan on behalf of the employer and the insurance carrier as to this man's earning capacity, we still deny that he was disabled prior to August 7th, 1933.

The Deputy Commissioner: It is agreed that he suffered a laceration of the forehead and left hand and a fracture of the foot?

Mr. Myers: I think that the nature and character of the injuries should be proved, because they have a distinct bearing on the period of disability.

Mr. Donovan: They have.

The Deputy Commissioner: Can it be admitted that the [fol. 27] wages of the claimant at the time of the injury were $18 a week, working six days a week?

Mr. Myers: How long was he employed?

Mr. Donovan: He had been for about eight months before the accident.

Mr. Myers: That is substantially the whole of the year. Eight months is substantially the whole of the year prior to the accident. I am willing to stipulate that it was $18 a week.

The Deputy Commissioner: What do you mean by that? Do you mean that we can recognize the regular wage as being $18 a week, working six days?

Mr. Myers: That is the average.

The Deputy Commissioner: That is the actual wage.

Mr. Myers: That is the actual wage he was earning at that time.

(At this point an informal discussion was had which, pursuant to the order of the Deputy Commissioner, was not recorded.)

The Deputy Commissioner: You are raising the points that are in the original transcript?

Mr. Myers: Yes.

The Deputy Commissioner: That is a part of the record. Look at it and see if there is anything else you want to raise.

Mr. Myers: I presume I can reaffirm——

The Deputy Commissioner: (Interposing.) I made that part of the record. Is there anything more?

[fol. 28] Mr. Myers: I raise at this hearing the same questions I raised then.

The Deputy Commissioner: Will you admit that the Palais Royal, as an employer, was under the supervision of this Act at the time of the injury?

Mr. Myers: Yes.

The Deputy Commissioner: Do you admit that Isaac Chapman was an employee of and rendering service for the employer-on that date?

Mr. Myers: Yes. I think the same admissions are in the original hearing.

The Deputy Commissioner: Yes. You have admitted the wages, too.

Now, then, your denials are the same as contained in the transcript and you are demanding that proof be furnished with reference to temporary total and permanent partial disability, if any?

Mr. Myers: Yes, and the fact that they have exhausted their remedies in court.

The Deputy Commissioner: Let me understand——

Mr. Myers: (Interposing) I think the same question of jurisdiction is before you at this time and that at the last hearing it had not been shown.

The Deputy Commissioner: Your contention is based on the ground that he failed to exhaust or secure the rights [fol. 29] within the statutory limits and that has barred this insurance company from the rights of subrogation?

Mr. Myers: Also with respect to his pursuing his right against the third party. He should have exhausted his remedies, and not stop and then go back to compensation, because that would bar us from being a subrogee and bar our rights.

The Deputy Commissioner: I think we have a decision in the Van Duesen case. Apparently the claimant had not pursued his rights within one year and barred the employer from bringing his right of action in court, and I rejected the claim, but the Court reversed my opinion; it went so far as to say that the employer had no financial responsibility. That was the action of the Court and it reversed my action.

Mr. Myers: I do not think the Van Duesen case is the same as this. Here a very definite action had been taken by the employee to prosecute his claim and he has done so, but he has not followed that as to definitely preclude him from getting relief from that source, and he must definitely conclude it from that end, because then the remedy we have is a hollow one, which cannot be followed.

The Deputy Commissioner: May I ask, Mr. Donovan, just what has been done? Was the case finally dismissed from the Court?

Mr. Donovan: That is correct, and it was done in abidance with the decision of Mr. Justice Bailey, who stated that in his opinion the matter could be sent back and [fol. 30] that you would have complete jurisdiction of it. We attempted to get it before the jury. As a matter of law, in the light of the opinion of the Court of Appeals rendered in the Chapman case, we are absolutely barred from proceeding further, because in that case he was held guilty of contributory negligence, and as the doctrine of the last clear chance was held not to apply, naturally, we had no right to proceed any further. Mr. Justice Bailey was of the opinion that the dismissal of the action would permit it to go before you.

The Deputy Commissioner: I am going to take the matter.

Mr. Myers: I merely want to preserve my rights, because the records of the Court—I think I am right in this—show that the case was not dismissed by the Court but was discontinued by a præcipe filed by the attorneys, and that under the circumstances it was a voluntary action on the part of the claimant through his attorneys that the action was discontinued.

The Deputy Commissioner: I am going to take jurisdiction, Mr. Myers, for the purpose of going ahead with the case.

Mr. Myers: I want the record to contain that information.

The Deputy Commissioner: Who is representing the claimant?

Mr. Donovan: Mr. Wood and Mr. Donovan.

The Deputy Commissioner: What witnesses do you have?

Mr. Donovan: Dr. Jack and Dr. McKinney are in the waiting room.

The Deputy Commissioner: Are they all the witnesses [fol. 31] you have?

Mr. Donovan: Yes.

The Deputy Commissioner: Representing the respondent is Mr. Frank Myers. Do we have somebody with the Zenbury Brothers' records?

Mr. Myers: They were subpœnaed. I do not know whether they are here or not.

The Deputy Commissioner: What witnesses do you have Mr. Myers?

Mr. Myers: I have Dr. Larkin and Dr. Hall.

The Deputy Commissioner: Is that all?

Mr. Myers: Yes.

The Deputy Commissioner: I will ask Mr. Chapman and Dr. Hall to please stand and be sworn.

(Thereupon the claimant and Dr. Hall duly sworn by the Deputy Commissioner.)

Mr. Myers: Do you want to put the doctors on first?

Mr. Donovan: Yes; I would like to put them on first.

The Deputy Commissioner: Dr. Jack and Dr. McKinney, will you please stand and be sworn?

(Thereupon the witnesses indicated were duly sworn by the Deputy Commissioner.)

Thereupon——

Dr. Arthur B. McKinney was called as a witness for and on behalf of the claimant and, having been previously duly [fol. 32] sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

Examination in Chief.

By the Deputy Commissioner:

Q. Doctor, give your full name.

A. Arthur B. McKinney.

Q. What is your address?

A. 1515 First Street, Northwest.

Q. Of what school are you a graduate and in what year did you graduate?

A. 1914, Howard University.

Q. Did you practice any special line of medicine?

A. General surgery.

Q. You are a general practitioner?

A. General practitioner, yes.

The Deputy Commissioner: All right, Mr. Donovan.

Direct examination.

By Mr. Donovan:

Q. You do not practice surgery now?

A. Not now.

Q. When was the last date that you performed any surgical operation?

A. It depends upon——

Q. (Interposing.) A major operation.

[fol. 33] A. Well, I should judge since—before I got sick in 1926.

Q. That was the date of your illness?

A. Yes, May 5, 1926.

Q. Since that time you have been devoting yourself to the general practice of medicine?

A. Yes, general practice. Of course, it is called a medical part of surgery just the same.

Q. Do you know Isaac Chapman, who is sitting there (indicating)?

A. I do.

Q. Sometime after January, 1929, did you have occasion to treat Mr. Chapman?

A. About 1929, but I don't exactly remember the date, but it was in 1929.

Q. Do you have your records?

A. No; I did not bring them with me.

Q. You did not bring your records?

A. No.

Q. You do not remember the date when you first treated him?

A. He got hurt in December and I think I saw him in January.

Q. January, 1929?

A. 1929, yes.

[fol. 34] Q. What did he complain of then?

A. He complained of great stiffness, inability of locomotion; he could not function; he could not jump and move about as he used to.

Q. Did you examine Mr. Chapman at that time?

A. Yes, sir.

Q. As a result of your examination, Doctor, what did you find to be the trouble with him?

A. Well, I found, from his history and what I found, that he had a lack of motion in the great left tow—I think it was

the left or right—the great toe. He had a fracture of the metatarsal bone; he had a stiff ankle; and he had some adhesions and some tenderness of the foot, so he could not manipulate that foot as he ordinarily could; it was stiff.

Q. For how long a period did you treat him, Doctor?

A. I had strapped his ankle once. It was weak; it was giving away first when he came. Then about two weeks after that—Then he came again some time later; I don't know just when. I think I treated him off and on for at least—off and on until now, steadily, because he would drop in most any time. When he felt bad he would drop in.

Q. Did he complain of any other ailments besides complaining of his foot?

A. Why, yes, he said the head hurt him, and he was not able to sleep at first.

[fol. 35] Q. Did you find any evidence of any injury to his head?

A. Well, an old scar, which had healed up.

Q. Where was the scar?

A. On the scalp. I think it was on the right side; it was on the scalp.

Q. During this period that you treated Mr. Chapman what did he complain of other than the broken foot?

A. Nervousness and insomnia; that is, he was not able to sleep at night, but the greatest complaint was the inability to move on that foot.

The Deputy Commissioner: Do I understand that the Doctor's statement was that his disability was due to the injury to his foot and a head injury, which caused the insomnia?

The Witness: I think the insomnia was the result of the accident and his anxiety. I do not think the injury caused that.

By Mr. Donovan:

Q. Have you any idea when the last date of the treatment was?

A. The last day I treated him?

Q. For the injuries you just mentioned.

A. I think a day or two before we had to go to court for trial. I think it was 1932; in the spring time of 1932.

Q. February, 1932?

A. That is about when it was.

[fol. 36] By the Deputy Commissioner:

Q. You treated him to February, 1932?

A. I treated him a few days before we went to court.

The Deputy Commissioner: What date was that?

Mr. Donovan: February 3, 1932 was the day of the trial.

The Deputy Commissioner: I will put it as February 1st.

By the Deputy Commissioner:

Q. That would be approximately it?

A. Yes.

By Mr. Donovan:

Q. As the result of your treatments of Mr. Chapman during that period did you diagnose the exact condition he was suffering from with his foot?

A. Treatment?

Q. Did you diagnose what he was suffering from with reference to his foot? During that period was he suffering from a fracture of the foot and was it as the result of that injury, or did some disability develop?

A. As a result of that injury he suffered from an old healed fracture. When a fracture heals up callous forms particularly if a nerve is caught, it would give pain. It would have a periosteal thickening and there would be pressure. If you press down on it like that (indicating) it would pain.

Q. Did you give him any treatment for that periosteal thickening?

[fol. 37] A. Yes, for the periosteal thickening.

Q. For how long did you treat him for that condition?

A. I should judge, off and on, for two or three months or more; at least that long.

Q. During that time was he able to walk without the aid——

A. (Interposing.) With a walking cane. He was walking with a walking cane.

Q. It was necessary for him to use a cane?

A. Yes.

Q. During that period was he able to do any work which would require that he use his foot a great deal?

A. To the best of my knowledge, I have known him for quite some time. After he had that accident I have not seen him work at all; I have not seen him work.

Mr. Myers: I object to that answer. The question was, Was he able to perform the work?

The Witness: I should say no, not the character of work he was doing.

By the Deputy Commissioner:

Q. He was not able to resume his work on February 1st, 1932?

By Mr. Myers:

Q. Is that your answer?

A. The last time I saw him was February 1, 1932, just before court. I would say that he would not be able to work doing the character of work he had formerly done. Yes, I would say that.

[fol. 38] By the Deputy Commissioner:

Q. What was the reason for his inability to work? The condition of the foot?

A. The condition of his foot.

Q. How about his mental anxiety?

A. I do not think that would necessarily follow.

Q. His total disability at that time was due to his foot injury?

A. That is my opinion.

By Mr. Donovan:

Q. Doctor, did you notice a deformity of the foot as a result of that accident?

A. I did, because in any accident, if it heals up, you are going to have some deformity.

Q. Would you say that that was a permanent deformity or has it been rectified, if you know?

A. Once any bone is broken and the callous forms, it is that way for life; it never——

Mr. Myers: I object to this line of answering. The question was whether this man had any, and not any bone in any one. I think he ought to be restricted to that.

By the Deputy Commissioner:

Q. Did you take an X-ray picture at any time?

A. No, sir; I did not.

Q. Did you at any time see an X-ray?

A. Yes; I saw it in court only.

[fol. 39] Q. Do you remember when that picture was taken?

A. I think Drs. Groover, Christie and Merritt had it.

Q. There was an X-ray picture taken on the 16th day of December, 1928, at Emergency Hospital. Is that the picture you are talking about?

A. I suppose it was.

Q. When you said that you gave your last treatment did you see any picture then?

A. No, sir.

Q. How did you determine that there was a periosteal thickening?

A. By pressing with my fingers.

Q. Because of tenderness?

A. On pressure, feeling (indicating). That is the only way I could determine—with my fingers.

Q. That was the metatarsal of the great toe?

A. Yes.

Q. Was there any deformity of angulation?

A. Elevation; not on a straight level.

Q. Was it on more than a normal elevation than the dorsal part of the foot?

A. Yes.

Q. You saw no pictures to see if there was an angulation of that?

A. No.

[fol. 40] Q. You determined it was a periosteal thickening by feeling it with your fingers?

A. Yes, by palpa*ta*tion.

The Deputy Commissioner: As I understand it, he has not seen him since that time, to determine the amount of the disability?

Mr. Donovan: No.

By Mr. Donovan:

Q. You have seen him since that time?

A. Yes.

Q. But you have not made any physical examination of him since that time?

A. No, I have not.

Q. During that period did you have occasion to treat Mr. Chapman for any nervous disorder?

A. Yes; inability to sleep at night, insomnia.

Q. Did you prescribe anything for it?

A. Yes, I did.

By the Deputy Commissioner:

Q. Was that subsequent to February?

A. Prior to February. He used to have a little tremor, you know, shaking like that (illustrating).

By Mr. Donovan:

Q. He did?

A. Yes.

[fol. 41] Q. Did that condition also contribute to his inability to work, in your opinion?

A. I think that was more due to the foot than to the nervousness.

Q. Was there a contributing cause?

A. Which?

Q. The nervousness?

A. Yes, I think it was.

Q. Of course, that contributed to his inability to perform——

A. (Interposing): His usual amount of labor; yes, that is true.

Mr. Donovan: I think that is all.

Cross-examination.

By Mr. Myers:

Q. What sort of treatment did you give this man?

A. I gave him electrical massage.

Q. What type of electrical massage?

A. Diathermy.

Q. What is your diathermic treatment?

A. Diathermic treatment, but I was using a violet ray on him at that time. That stimulates the circulation.

Q. Was that the first type of treatment the first time you saw him?

A. No. I strapped his ankle the first time.

[fol. 42] Q. You strapped his ankle the first time.

A. Yes. His ankle was weak.
Q. Were you the first one to treat him?
A. You mean after he left there?
Q. What was the first treatment you gave him?
A. I strapped his ankle and gave him medicine.
Q. What kind of medicine?
A. An opiate; just what, I don't know. I think it was—An opiate.
Q. You strapped his ankle?
A. Yes.
Q. How long did that strapping remain on it?
A. About two weeks.
Q. You took the strapping off then?
A. Yes.
Q. What else did you do during the first treatment?
A. I gave him medicine.
Q. What else did you do?
A. That is all.
Q. All you did was to give him an opiate and strap his ankle on the first time you saw him, which was about the first part of January, 1929?
A. Yes; I think it was about the first part of January.
Q. On that occasion you merely gave him an opiate and strapped his ankle?
[fol. 43] A. Yes, if I remember correctly.
Q. When did you next see him?
A. About two weeks after that.
Q. You did not see him again for two weeks?
A. I did not see him again for two weeks.
Q. What did you do on the next occasion?
A. Strapped his ankle once more.

By Mr. Donovan:

Q. What was the matter with the ankle?
A. He was complaining of inability to steady himself. He did not feel good. He wanted it strapped up, so I strapped it.

By Mr. Myers:

Q. Was anything wrong with the ankle?
A. It gave him pain.
Q. Was there any fracture?
A. Not to his ankle, not to my knowledge, no.

Q. What did you do on the second occasion? Did you strap it up?

A. About two weeks after that, yes.

Q. When did you see him again after that?

A. I don't know. I guess about ten days or a week or more.

Q. What did you do on the third time?

A. Took it off and gave him electrical treatment.

Q. It was not until the third time that you gave him diathermic treatment?

[fol. 44] A. Yes.

Q. You say that you saw him some time in February, 1929?

A. I suppose it was, yes.

Q. At that time you gave this diathermic treatment? How often did you give him that?

A. I think he got it three times a week for about two months.

Q. For about two months?

A. Two or three months.

Q. February and March and up until April, 1929?

A. I could not say for sure, but I would say—not having my records—up until two or three months; something like that; about three times a week.

Q. You gave him diathermic treatments three times a week?

A. Yes.

Q. To what portion of his body were they given?

A. To his ankle, his foot, the upper surface and the lower part of his foot, and the toe.

Q. What was wrong with his foot?

A. His foot was stiff.

Q. Was he walking on it at that time?

A. Walking with a cane; yes.

Q. At that time he was walking with a cane?

A. Yes.

The Deputy Commissioner: What is the time?

[fol. 45] Mr. Myers: We are talking now about February, 1929.

The Witness: Yes.

By Mr. Myers:

Q. He was walking with a cane at that time, and was receiving the heat treatments three times a week; is that correct?

A. Yes.

Q. In February, 1929, he was walking with a cane and receiving heat treatments three times a week until about April, 1929?

A. A couple of months.

Q. That was in April. What happened in April, 1929?

A. Let me see. I don't know what happened, but I do not think I treated him any more.

Q. You did not treat him any more?

A. Not right then.

Q. When was the next time you treated him in April?

A. I won't say specifically any month. I judge about two months; from April, or when it was; I couldn't say.

Q. Judging from your own recollection, when was it after April, 1929, that you again treated him?

A. You mean for what? There wasn't—maybe I probably treated him most any time. For instance, he would catch a cold; he would come to see me.

By the Deputy Commissioner:

Q. When did you treat him again for that injury?

[fol. 46] A. For that same injury?

Q. Yes.

A. I don't recall. Let me see. It seems to me I treated him some time during the summer, but just when it is hard for me to say without looking at the books.

By Mr. Myers:

Q. What did you do for him in the summer of 1929?

A. Gave him some massage for the foot and ankle.

Q. He was using the foot all the time?

A. Yes.

Q. Did you determine in April, 1929 that anything necessary in the way of palliatives or remedial treatment was completed at that time?

A. Did I do what?

Q. When did you determine that all the treatment you thought he required, from your standpoint, was completed and that he must use his foot?

A. I think it was about a couple of months after I took the strap off.

Q. In April, 1929?

A. About that time.

Q. At that point you had determined that there was no further necessity for diathermic treatment?

A. Not unless he had more discomfort.

Q. You told him to go ahead and use his foot at that time?

A. Yes.

[fol. 47] Q. How much disability did he have at that time?

A. Well——

Q. (Interposing) From a medical standpoint.

A. At that time I would say, so far as function was concerned, it was almost total. It was not partial; it was almost total. You could not flex his ankle; it was so stiff.

By the Deputy Commissioner:

Q. Do I understand that this is after you gave him massage?

A. At the time.

Q. At the time you were giving him massage?

A. Yes.

Q. Mr. Myers and I want to know when you quit giving him massage in April, what was the condition of his foot?

A. He could move about, but he did not seem to be able to flex his foot and be able to use it as he had before this accident.

Q. You have not seen him since April?

A. I have seen him most any time. He lives near me and I see him almost any time.

Mr. Donovan: He testified that he saw him in February, 1932, and his treatments stopped in 1932, which was three years after the injury.

Mr. Myers: We are developing that he treated him for a larger number of things.

[fol. 48] By Mr. Myers:

Q. After you finished giving diathermic treatments in April, 1929 what was his disability at that time in regard to his foot? What was the extent of his disability?

A. I would say almost total.

Q. Do you mean 90 per cent?

A. Yes, about 90 per cent.

Q. When you had finished giving him electrical treatments and concluded he did not need any more and that he should go ahead and use his foot, at that time he had 90 per cent. disability from a functionally disabling point?

A. Yes.

Q. Did you see him again in the summer of 1929?

A. Yes.

Q. At that time what was the extent of disability?

A. Almost the same as when I left.

Q. No improvement?

A. Not much.

Q. Would you say it was about 80 per cent.?

A. I would not want to estimate that—Well, I should say, if you judge it that way, yes.

Q. Was that for the foot or the toe?

A. Toe and foot. You need the toe to walk with.

Q. He was walking at the time?

A. Yes.

[fol. 49] Even though he was walking, you would still estimate that his disability in the summer of 1929 was 80 per cent.?

A. Well, wait until I figure the dates.

Q. In April, 1929 you finished the heat treatments?

A. Yes.

Q. You determined at that time that he did not need any more heat treatments and he should go ahead and use his foot and he had the functional disability of 90 per cent.?

A. Yes.

Q. You treated him after that?

A. I saw him in the street.

Q. You did not look at his foot?

A. I saw him in the street; I looked at his foot.

Q. You looked at his foot in the street in the summer of 1929?

A. Yes.

Q. And at that time what did you determine? What test did you make?

A. I did not make anything but observation. I put my hand on it like that (indicating).

Q. You put your hand on him?

A. Yes; I put my hand and did that (indicating).

Q. When, after the summer of 1929, did you see him again professionally with reference to his foot?

A. I will have to get the records; I can't remember.

[fol. 50] Q. What is your best recollection as to when you next saw him after the summer of 1929 with reference to the examination and determination of the disability of his foot?

A. I think that I saw him one day last summer.

Q. 1933?

A. Yes.

Q. I thought you said the last time you treated him professionally was February 1, 1932.

A. Yes. You asked me when I saw him the last time.

Q. I asked you and you said in the summer of 1929 in the street and you saw and observed his foot and determined at that time that his foot was totally disabled, functionally, 80 per cent.

A. Yes.

Q. When, after the summer of 1929, did you see him again and see his foot?

A. No more after that. I have not seen him since then.

By Mr. Donovan:

Q. Did you not just previously testify that you examined him on February 1, 1932, to see if he had functional disability?

A. Let me write this down. The way he is talking about, you are making an effort to confuse me.

Mr. Myers: I am not trying to confuse you.

The Deputy Commissioner: We will have this off the record.

[fol. 51] (Thereupon an informal discussion was had which, pursuant to the order of the Deputy Commissioner, was not reported.)

By Mr. Myers:

Q. In the summer of 1929 you say that you saw him on the street?

A. Yes.

Q. You observed his foot and felt it and determined at that time that he had a functional disability to his foot of 80 per cent.?

A. Yes.

Q. When next did you see the man and examine his foot to determine the disability?

A. When did we go to court?

Q. You went to court February 3, 1932.

A. I saw him in February just before we went to court.

Q. At that time you looked at his foot and examined him?

A. Yes.

Q. How much did you determine his foot was disabled at that time?

A. At that time I would say he had about 90 per cent. disability.

Q. He had 80 per cent. in the summer and that went back to 90 per cent.?

A. In other words, he had 90 per cent. You led me to say 80 per cent. I would not say 80 per cent. of my own accord.

[fol. 52] Q. Go back, then, and correct your statement. In the summer of 1929 he had how much functional disability of his foot?

A. 90 per cent.

Q. He still had 90 per cent. functional disability on February 1, 1932?

A. February, 1932, yes. That was before I went to court?

Q. Yes.

A. That is right.

Q. He still had 90 per cent. functional disability at that time?

A. Yes, I would say that.

Q. But you had determined back in April, 1929 that he did not need any further treatment, as far as your examination went?

A. In 1929 I would say he did not need any treatment.

Q. Why was the foot in the summer of 1932 showing a functional disability of 90 per cent.?

A. I would say the adhesions and this calloused bone formation where it was united.

Q. Didn't your heat treatments help to break this up?

A. It would help, but it does not help to do what we wanted it to do. We try to do everything in medicine, but it does not help——

[fol. 53] Q. (Interposing) When did you give this massage?

A. You see, heat stimulates the circulation to the part and causes the lymphatics to go there, and causes improvement in the blood circulation.

Q. Did you give massage at the same time?

A. Yes, massage at the same time.

Q. You did not use manual massage?

A. No.

Q. In the course of your treatments you did not use manual massage?

A. I had a machine to do it with; just a massage machine that you go over with like that (illustrating).

Q. As a matter of fact, did not that break up the adhesions?

A. I could not say it did. You can't break all adhesions; sometimes you have got to operate.

Q. Did you ever take an X-ray of this case at all?

A. No, sir, I did not. I do not do X-ray work.

Q. Did you have him send for an X-ray?

A. No, sir, I did not.

Q. You did not think it was necessary?

A. I thought it was necessary. He did not have the money to pay for it. It is always necessary to have X-ray pictures made.

Q. Am I correct in saying that you did not see the man [fol. 54] between the summer of 1929 and February 1, 1932, with reference to his foot; is that correct? Was that between the summer of 1929 and February 1, 1932?

A. Yes.

Q. With reference to his foot?

A. Yes.

Q. What sort of examination did you give this man on February 1, 1932?

A. February 1st I put his foot upon a table. I made an examination by using my hands, manipulation.

Q. What is that?

A. I used my hands. I put him on a table. I manipulated, doing like this (illustrating).

Q. Did you attempt to let him use it to see how he was using it?

A. I could see him using it when he came in.

Q. Did you let him bend while standing?

A. I did not do it.

Q. Did you determine the functional disability by manual motion?

A. I did it by myself, by passive motion; that is, by doing it myself.

Mr. Myers: That is all.

[fol. 55] Redirect examination.

By Mr. Donovan:

Q. At the time when Chapman came to see you in January, 1929, did he have a cast on his foot?

A. No, he did not.

Q. You stated, Doctor, that in April, 1929, you met Chapman on the street and you felt his foot at that time?

A. I said the summer; I did not say April.

Q. Could you state, Doctor, to the best of your recollection, whether he had normal use of his foot at that time?

The Deputy Commissioner: The Doctor said he had 90 per cent. disability.

The Witness: Yes, I did.

By Mr. Donovan:

Q. You also stated on cross-examination that you did not see Chapman between the summer of 1929 and February 1, 1932; is that correct?

A. I just saw him as a friend, not to examine his foot.

Q. I would like to direct your attention to the testimony you gave in the Chapman case in the Supreme Court about the time of treatment.

The Deputy Commissioner: Is he your witness? Are you trying to impeach him?

Mr. Donovan: He has taken me by surprise.

Mr. Myers: He has had plenty of chance to talk to this man. I do not think you have any right to bring in that [fol. 56] testimony. You cannot impeach your own witness with his testimony.

Mr. Donovan: I certainly think I do. Mr. Myers understands the position I am in. I have not talked to the witness.

The Deputy Commissioner: I am not going to allow you to impeach your own witness, because that means you have no medical testimony.

Mr. Donovan: I have Dr. Jack.

By Mr. Donovan:

Q. Is that you best recollection?

A. About treatment?

Q. Yes. Do your records show the extent of the time you treated him?

A. I think I did.

Q. Will you get those records and bring them here?

A. I will see if I can find them. You see, during the course of my sickness I was not able to look after my things. Therefore, a lot of them were lost. I think I testified to that in court.

Q. Will you attempt to find those records? Couldn't you get them now and bring them back?

A. I will try to get them.

Mr. Donovan: I ask that he be excused.

By Mr. Myers:

Q. My recollection is that you had difficulty in finding your records and reports at the time of this trial.

[fol. 57] A. Yes.

Q. There was a great deal of questioning about the authenticity of it in that trial.

A. They wanted to know if it was true.

The Deputy Commissioner: What do you want to prove by the records? Are you trying to show that there was disability beyond February 1, 1932?

Mr. Donovan: Of course, the Doctor can't testify to it. The one point I want to clear up is that the Doctor has testified on cross examination that he did not see Chapman between the summer of 1929——

The Deputy Commissioner (Interposing): His testimony was that he had 90 per cent. disability on February 1, 1932, which was the same as in the summer of 1929.

Mr. Donovan: All right, sir.

By Mr. Myers:

Q. Doctor, you are quite positive that when this man came to you he had no cast on his foot?
A. Yes.

Mr. Myers: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon——

DR. WILLIAM A. JACK was called as a witness for and on [fol. 58] behalf of the claimant and, having been previously duly sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

Examination in Chief.

By the Deputy Commissioner:

Q. State your full name, Doctor?
A. William A. Jack.
Q. What is your address?
A. 2250 Cathedral Avenue.

The Deputy Commissioner: Do you admit Dr. Jack's qualifications as a surgeon and physician?
Mr. Myers: Yes.

Direct Examination.

By Mr. Donovan:

Q. Dr. Jack, did you have occasion to examine Isaac A. Chapman?
A. Yes. I was asked to examine him one day.
Q. Do you have the date of that examination?
A. I think it was in 1932.

By the Deputy Commissioner:

Q. You may refer to your records, if you wish.
A. I examined him, yes.

By Mr. Donovan:

Q. Was there any other doctor present at that time?
A. That I can't remember; it was a long time.

[fol. 59] Q. Do you recall whether Dr. Larkin was there?

A. I don't recall. I had to dig this up to find out when it was.

The Deputy Commissioner: Do I understand that he examined him at the time Dr. McKinney examined him in February, 1932?

Mr. Donovan: No; I do not think so. I do not know the date at all.

By Mr. Donovan:

Q. Do you have an idea as to the approximate date, Doctor?

A. I think it was some time in May.

Q. May, 1932?

A. Yes; that is as near as I can get at it. I saw the man but one time, at that time.

Q. As a result of that examination what did you find to be the trouble?

A. He had a healed fracture of the first metatarsal bone of the right foot and some limitation of motion, where the extensor tendon goes over, and some thickening around the site of the fracture.

Q. Did you examine the X-rays, Doctor?

A. No; I never saw the X-rays.

Q. What was the extent of his disability as a result of the injury at that time?

A. Why, he limped slightly and complained of pain on [fol. 60] weight-bearing.

Q. Would you say, as a result of your examination, that he could have used his foot in an occupation that required that he get around and jump around up steps perhaps twenty-five or thirty-five times a day?

A. He could, but it would be painful. A man can do a lot of things if he has to, but not comfortably, with an old healed fracture.

Q. Did you notice any permanent deformity of the foot at that time?

A. I could not make out any deformity except the thickening from the healed fracture.

Mr. Donovan: That is all.

Cross-examination.

By Mr. Myers:

Q. Can you give us any better recollection as to when you made this examination?

A. No; that is as near as I can come to it.

Q. Do you recall whether or not it was after the trial which this young man had, or was it before?

A. That I do not know. I did not know there had been a trial.

Q. Did you know whether or not Dr. Larkin had made an examination at the same time or approximately the same time as you had?

[fol. 61] A. That I do not recall at all.

Q. If Dr. Larkin made an examination in May, 1929, would that help your recallection in determining as to when you made your examination?

A. No. I just dug up an old record that I saw this man Chapman at such and such a time, in May.

Q. Does your record show the year?

A. 1932.

Q. It shows the year to be 1932?

A. Yes.

Q. What was the occasion for the examination?

A. I don't know. Dr. McKinney asked me to look at his foot.

Q. You heard him testify that the last time he saw him professionally was April 1, 1932?

A. I don't know anything about that.

Q. Doesn't that bring to light that you are probably in error as to the date?

A. I may be in error.

By the Deputy Commissioner:

Q. Might it have been in 1931?

A. It might possibly have been. As I say, I have a recollection of seeing the man just that one time.

By Mr. Myers:

Q. What did you find? An old healed fracture of what?

[fol. 62] A. Of the first metatarsal of the right foot.

Q. I believe you said that you did not have occasion to treat the injuries in this case.

A. No, I did not.

Q. Where is the metatarsal bone in the foot?

A. Well, now, here (indicating) is your toe. The metatarsal is the one that comes before your phalanx (indicating).

Q. The metatarsal is here (indicating)?

A. Yes, here (indicating).

Q. What is this (indicating)?

A. This (indicating) is the phalanx.

Mr. Myers: Will that be stipulated, in order not to have Dr. McPeak come here, as to what the X-ray findings were?

Mr. Donovan: Yes.

By Mr. Myers:

Q. Doctor, look at that (handing a paper to the witness). Will you tell me what injury you found following the injuries disclosed by this X-ray report?

A. I didn't find anything at all except this thickening of the metatarsal.

Mr. Myers: I offer for the record this X-ray report, which has been agreed upon. It is the X-ray which was taken in this case on December 17, 1928, by Dr. McPeak. It gives the following findings:

"Examination of the right foot shows a fracture through [fol. 63] the middle third of the first phalanx of the great toe with no appreciable displacement. The position is satisfactory.

"There is also a small fragment detached from the proximal lateral articulating surface of this toe with no displacement.

"There is a complete fracture through the middle third of the second phalanx of the second toe, with no appreciable displacement. The position is satisfactory.

"There is also a complete fracture of the second phalanx of the fourth toe, with angulation, concavity to the bottom of the foot.

"There is a fracture through the tip of the terminal phalanx of the little toe, with no displacement. The position of all of the fragments is satisfactory with the exception of the one involving the middle phalanx of the fourth toe."

The Deputy Commissioner: Was that the first toe?

Mr. Myers: It is the first toe and the middle third of the phalanx of the second toe and the second phalanx of the fourth toe.

The Deputy Commissioner: That is the first, second and fourth toes?

Mr. Myers: First, second and fourth toes.

By Mr. Myers:

Q. Which one of these injuries did you find?

A. I didn't find any of those injuries. All I found was an old injury here (indicating).

[fol. 64] The Deputy Commissioner: Indicating the first metatarsal bone.

By Mr. Myers:

Q. You found no injury affecting any of the phalanxes?

A. No. I did not find any. At the — I saw him it had been some time after any injury. They might have occurred——

Q. (Interposing): Since that time?

A. Before that time, because I had no real way of knowing——

Q. (Interposing): You are not in a position to say that what you found was anything resulting from this particular accident in 1928?

A. No.

Q. As a matter of fact, the X-ray does not show that particular fracture?

A. No, That had been healed up long enough, so it would not show.

Mr. Myers: No further questions.

Redirect examination.

By Mr. Donovan:

Q. Would you say that the injury that you did find was the sole cause of the disability which the man suffered from his foot?

A. As I say, the disability, except for the history of the injury to his tendons, I would not say that the bony injury

had anything to do with the—the bony disability I found [fol. 65] had anything to do with the limp.

Q. It was another injury?

A. An injury to his tendons could cause that.

Recross-examination.

By Mr. Myers:

Q. Did you find any injury to his tendons?

A. You can't find that; only from stiffness.

By the Deputy Commissioner:

Q. From functional use?

A. Yes.

By Mr. Myers:

Q. Leaving out as to what was the particular fracture in this case, what did you find at the time of the examination to be the functional disability of this man?

A. He walked with a decided limp and complained of great pain on weight-bearing.

Q. What was his disability at the time you saw him?

A. As I say, he had a slight limp.

Q. Could you estimate any percentage of what the disability of his foot was at that time?

A. Hardly, because I do not know how much disability he had before I saw him.

Q. How much would you say it was at that time, taking into consideration all the factors?

A. Well, of course, my opinion would be biased, looking [fol. 66] at all the other injuries.

Q. From your own examination?

A. From my own examination, I would say the injury was due more to the involvement of his nervous structure rather than his bone structure. This old thing might be pressing on some of the smaller nerves and hurting him.

Q. Would you be able to say what percentage of functional disability he had of his foot at that time?

A. No, I would not.

Mr. Myers: I have no further questions.

Mr. Donovan: That is all.

By the Deputy Commissioner:

Q. The functional disability of the foot was due, in your opinion, to the fracture of the metatarsal bone?

A. Yes.

Q. And not to the fracture of the toes?

A. Because that is all I found.

Q. Was there any disability of the foot due to the fracture of the first, second and fourth toes, as far as you could observe?

A. Not as far as I could observe, because my observation was that the limp was due to the injury of the first toe. You do not limp on it from injuries of the first, second and fourth toes.

By Mr. Donovan:

Q. Could you notice whether there was any fracture of [fol. 67] the big toe, the phalanx?

A. I don't recall.

Q. There could have been?

A. It could have been and I might not have seen it at all.

Q. That could have contributed to the functional disability?

Mr. Myers: He said he did not find any. How could he say whether it could if he did not find any?

The Witness: I could not find any.

The Deputy Commissioner: The Doctor said there was no disability from the injury to the toes, but it was due to the metatarsal.

Mr. Donovan: I think he testified contrary to that.

By the Deputy Commissioner:

Q. Did you testify that the disability the man was suffering from was due to the fracture of the metatarsal and none of it due to his toes?

A. I said yes, I said it was due to the tendon involvement and not to the bone involved. The bone, as I say, was all healed, and that would not cause any disability, because there was no deformity.

Q. You said no disability as the result of the fracture of the toes?

A. I said that I did not think there could be any disability as far as making a man limp, if there was a fracture of the [fol. 68] first toe.

By Mr. Donovan:

Q. It was all in the tendons?
A. Yes, sir.

By Mr. Myers:

Q. From the first metatarsal?
A. From my observations, yes.

Mr. Myers: That is all.
Mr. Donovan: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon——

Dr. Custis Lee Hall was called as a witness for and on behalf of the respondent and, having been previously duly sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

By the Deputy Commissioner:

Q. Doctor, give your full name and address.
A. Custis Lee Hall, 1801 R Street.

The Deputy Commissioner: The qualifications of the Doctor will be admitted unless there is some objection.
Mr. Donovan: No objection.
Mr. Myers: May I, for the benefit of the record, know whether this man's correct name is Isaac or Isaiah?
[fol. 69] Mr. Donovan: It is Isaac.

Direct examination.

By Mr. Myers:

Q. Will you be good enough to state, for the benefit of the record, when you first saw this man and what your findings were?
A. April 13, 1934.

Examination: As this man stands, there is a typical racial flat foot, not any more marked on the right than the left. The weight seems to be evenly on the two feet. He has a slight tendency to avoid rising on the toes on the right foot, complaining of discomfort, but he is able to squat on the same foot without difficulty. There is no residual limitation of function in the movements of the ankle, and the measurements of the right calf indicate one-fourth inch greater circumference than the left, although there is no evidence of swelling or induration at this time. There is some slight tenderness complained of in the plantar fascia region on the right foot, but there is no evidence of thickening or induration. All the metatarsal heads are in good position. All of the toes appear normal at this time. There is, however, a slight tendency for flexion of the toes, second and third, but the toes are flexible in all directions. There is no angulation laterally of any of the toes and no tendency for hammer toe. The great toe joint seems normal in motion. The left foot shows substantially the same [fol. 70] appearance as the right and the arch is in the essential position as compared to the right.

Examination of this patient's shoes indicates that there is no abnormality in walking; if anything, the right shoe is a little more worn across the ball of the right foot than the left. In other words, there is no indication of an abnormal protection of the right foot.

X-ray films at Emergency Hospital are not available, having been destroyed because of the fact that they were made of inflammable material.

The X-ray report has been read into the record.

My diagnosis was: 1, Multiple fractures of the toes, second, third and fourth, healed; 2, functional strain, residual, metatarsal region, very slight.

By the Deputy Commissioner:

Q. What is that?

A. Very slight.

Q. What was that?

A. Metatarsal region, functional strain—residual functional strain.

"Opinion: This patient states that he has attempted to work driving a truck and that the discomfort associated with the use of his foot caused him to give up such work.

He states that he has done practically nothing since the injury. The laceration of the forehead which the patient [fol. 71] mentioned is apparently not causing any symptoms at the present time. While there is a slight scar in this region, I do not believe that it is causing symptoms at the present time.

"Whatever disability this man has is entirely functional and I believe associated more with a protective mechanism and lack of use, as he should have been able to return to his occupation several years ago. I doubt if any medical treatment is necessary."

By Mr. Myers:

Q. You have heard the testimony of Dr. McKinney today. Are you able to form any opinion, from hearing that testimony, as to whether or not this man had any functional disability to any extent at the time that Dr. McKinney saw him in 1929, having discharged him from diathermic treatments in 1929 and having made only an observation of the foot, feeling and manipulating it, in the summer of that year?

A. I could not form any definite opinion as to what the disability was, except that he had a limp.

Q. Would the fact that the man had been walking around with a cane and was walking around and had completed his positive treatments indicate to you that the functional disability was better than the estimate given by Dr. McKinney?

Mr. Donovan: I object to that question.

The Deputy Commissioner: What is the objection?

Mr. Donovan: The objection is, Mr. Commissioner, that he [fol. 72] wants him to state that because he had stopped the treatments of the man at that time that the Doctor's opinion was wrong. I do not think that the fact that the Doctor stopped the treatments in the summer of 1932 would in any way affect his opinion as to the extent of the disability.

By the Deputy Commissioner:

Q. Without examining the foot in 1932 would you be able to pass upon the condition of the foot and as to his disability?

A. No, sir. I just stated that I could not.

Mr. Myers: I understand the question has been stricken?

The Deputy Commissioner: Yes.

Mr. Myers: I think the Doctor has a right to give some opinion.

The Deputy Commissioner: You asked him to give an opinion upon the symptoms which Dr. McKinney saw. Go ahead and ask him a question.

By Mr. Myers:

Q. Are you able to form an opinion as to the functional disability to use his foot in the summer of 1929 or subsequent thereto, in view of the symptoms given by Dr. McKinney and in view of the fact that the positive treatments had ceased and that this man was using this foot and was using a cane? Are you able to express an opinion as to the functional disability?

A. I would rather not try to give any estimate of functional disability from the description. However, I would [fol. 73] presume that he must have had some residual stiffness of his foot, probably functional, but I don't know to what degree, because the examination does not give me enough details upon which to form any opinion.

By Mr. Myers:

Q. Are you able to state whether, from the details that were given to you, that functional disability was as high as 90 per cent. at that time?

A. If I may be allowed to express an abstract opinion, based entirely on hearsay, he certainly could not have had that much disability.

By the Deputy Commissioner:

Q. You mean from the fracture of the toes and any bruises that occurred at the time?

A. Yes.

Mr. Myers: I am asking the Doctor to give his opinion.

Mr. Donovan: The Doctor did not see the X-ray.

Mr. Myers: He saw the X-rays by Dr. McPeak, and the positions of the various fractures.

By Mr. Myers:

Q. Doctor, the disabilities that have been described in the X-ray of Dr. McPeak have been ascribed solely to the metatarsal?

A. No.

Q. I mean it applies only to the phalanx fractures?

A. Phalangeal fractures.

[fol. 74] Q. And not to the metatarsal fractures?

A. Yes.

Mr. Myers: I think that is all.

Cross-examination.

By Mr. Donovan:

Q. After the X-ray was taken by Dr. McPeak, of which you were informed, they would not show any injury to the fleshy part of the foot?

A. Never.

Q. If a heavy weight had fallen on his foot, breaking some of the bones, which would consequently——

The Deputy Commissioner: (Interposing) Just a moment. Where do you get any history in the case that a heavy weight fell on his foot?

Mr. Donovan: I am going to follow that up with the testimony——

The Deputy Commissioner: (Interposing) The records that I have before me show that there was a collision, but there was no description of a distinct injury to the foot.

Mr. Donovan: The Claimant will testify to that.

The Deputy Commissioner: All right. That will go in with the understanding that it will have to be supported by evidence.

Mr. Myers: You might ask the Doctor what history he obtained from the patient as to how the injury was sustained.

Mr. Donovan: All right.

[fol. 75] The Witness: This is the history: This patient is a truck driver and helper, who was injured December 15th, 1928, when a street car struck the truck in which he was riding, turned over the truck and pinned the patient's foot between the truck and the coping of the sidewalk.

By Mr. Donovan:

Q. The foot being crushed that way, would it cause an injury to the fleshy part of the foot; I mean the tendons and the other parts?

A. It might and it might not, because you can fracture the toe by a simple twist. Also, you have the protection of the shoe and of the sock. You might have wounds or not. You can fracture a toe by direct as well as indirect blows, so it does not necessarily follow that a fracture to the toe means an injury to the soft part.

Q. Would you say, under the circumstances this man was injured, that there was some injury?

A. The chances are that there was injury to the soft parts.

Q. That could have contributed to the disability?

A. That was a minor matter as compared with the injury to the toes.

Q. But it all contributed?

A. Yes.

Q. You said something about the plantar fascia of the foot. Where is that?

A. The plantar fascia is the ligament under the arch of [fol. 76] the foot.

Q. There was an injury there?

A. No.

Q. You found none there?

A. No.

By the Deputy Commissioner:

Q. You mean the cords were perfectly free and movable without any adhesions?

A. I mentioned that there was a tenderness there.

By Mr. Donovan:

Q. Tenderness?

A. Yes.

Mr. Donovan: That is all.

The Deputy Commissioner: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon——

ISAAC CHAPMAN, the Claimant herein, was called as a witness for and on his own behalf and, having been previously duly sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

Direct examination.

By Mr. Donovan:

Q. What is your full name?

[fol. 77] A. Isaac Chapman.

Q. You were on December 15, 1928, employed by the Palais Royal?

The Deputy Commissioner: I do not think that Mr. Myers is denying that. What are you going to prove by him?

Mr. Donovan: I am just going to ask him to state what was done after the accident for him and how long he had a cast on his foot and how long he had to use crutches.

The Deputy Commissioner: All right.

By Mr. Donovan:

Q. You were injured on December 15, 1928?

A. Yes, sir.

Q. While in a truck?

A. In a truck.

Q. Where were you treated?

A. At Emergency Hospital.

Q. What were you treated for, Mr. Chapman?

A. Well, they didn't do much to me that night, only bathed my foot and head—there was a scar. They sewed my head up (indicating).

Q. Did they give you any treatment for your foot other than bathing?

A. I had to go back the next day.

Q. What did they do on that day?

A. They took an X-ray, I think.

[fol. 78] Q. Did there come a time when they put a cast on your foot?

A. Yes, then they put a cast on. I think the next day they put a cast on.

Q. How long did that remain on there?

A. About four or five weeks—I would say about six weeks.

Q. How did you get around?

A. On—I used to go on crutches.

Q. During this time——

The Deputy Commissioner: (Interposing) That would be about the end of January?

Mr. Donovan: Yes.

The Witness: Yes.

By Mr. Donovan:

Q. Who treated you at the Emergency Hospital?

A. I don't know the doctor's name; different doctors at the time I went.

Q. You went to the clinic?

A. Yes.

Q. After the cast was removed were you able to use your foot freely?

A. No, sir.

Q. Did you have any artificial means to enable you to get around? Did you use a cane or crutches?

[fol. 79] A. I used crutches.

Q. How long were you going around on crutches?

A. Around six months I was on crutches.

Q. During that period were you able to put any weight on your foot?

A. No.

Q. You were not?

A. No.

Q. You just walked on one foot and the crutches?

A. Yes, and the crutches.

Q. During that period were you employed?

A. No, sir.

Q. How long was it after the accident before you could get around without the aid of crutches or a cane?

A. I will say about—I used crutches about six months and I used a cane about seven or eight months. Sometimes now I use a cane, in cloudy weather.

By the Deputy Commissioner:

Q. You mean you had crutches six months before you used a cane for seven or eight months after that?

A. Yes.

Q. What you were trying to say is that you used crutches and a cane about thirteen or fourteen months?

A. Yes, sir.

Q. After that did you have occasion to use the cane?

[fol. 80] A. Yes.

Q. How often, about?

A. Well, I didn't have any special time—every time my foot pained me I would use the cane.

Q. Did the weather contribute to the pain you suffered?

A. Cloudy weather, yes.

Q. What were the pains?

A. Pain would come through the instep at the bottom of my foot. Sometimes it would come up my leg as far as my knee, some time.

Q. During that period did you try to work?

A. No, sir.

By the Deputy Commissioner:

Q. Which foot was that?

A. The right foot.

By Mr. Donovan:

Q. Was that the foot that the cast was on?

A. Yes.

Q. Was that the foot which was treated at Emergency Hospital?

A. Yes

Q. Did you suffer, to the best of your knowledge, a fracture of the foot at any other time?

A. Since then?

Q. No; before or after that time?

[fol. 81] A. Before the accident?

Q. Yes.

A. No, sir.

Q. You never had any accident to it?

A. No.

Q. When was it that you first went to work after the accident?

A. Well, let's see; I got a job about two years after that.

Q. Where were you working, Mr. Chapman?

A. I was working for the Pan-Tex cleaners.

Q. Where is that?

A. Third and Florida Avenue, Northwest.

Q. What did you do?

A. I was driving a truck, delivering clothes.

Q. How long did you work there?

A. I worked about two weeks. Then I couldn't stand driving a car and I had to quit, so I used to go back and work at days—a couple of days a week.

Q. Why couldn't you stand driving the truck?

A. My foot used to swell on me. It seemed like the heat from the motor would do something to make my foot swell. It got so I could not get around; I had to give it up.

Q. Was that the first job you attempted to get after the accident?

A. Yes.

[fol. 82] Q. Did you apply for that job as soon as you thought you could get around?

A. Yes, sir.

Q. After that what work did you perform?

A. After that I didn't do anything until about eight or ten months ago.

Q. Eight to ten months ago?

A. Yes.

Q. During that time did you attempt to procure work?

A. Yes.

Q. You did?

A. Yes.

Q. That is, before the ten months' period?

A. No, sir.

Q. Why didn't you apply for work at that time?

A. Because my foot was bothering me all the time. I just felt that I could not do it.

Q. Was it paining you constantly?

A. Yes.

Q. During that period did you suffer pains in any part of your body?

A. My head.

Q. When did those pains first start?

A. They started, I will say, about six months ago. I started having those pains.

Q. In what part of the head did you suffer these pains?

[fol. 83] A. I had shooting pains like this (indicating),

grabbing me in the head from here (indicating) to the back of my head.

Q. Is that point you just indicated the place you suffered as the result of the injury?

A. Yes.

Q. In the hair?

A. Yes.

Q. When did that first start?

A. I will say about six months.

Q. After the accident?

A. Yes.

Q. Did they continue——

The Deputy Commissioner (Interposing): Just a moment. He said, in answer to a previous question, about six months ago.

Mr. Donovan: I am sorry, Mr. Commissioner; he misunderstood.

By Mr. Donovan:

Q. About six months ago they started?

A. Yes.

Q. How much did you earn while you were working for the Pan-Tex cleaners?

A. The two weeks I worked they give me $14 a week. Then when I worked two days a week they give me a dollar and a half a day.

Q. How many days did you work for them, approximately, at a dollar and a half a day?

[fol. 84] A. I will say about eight or ten days, off and on.

Q. Is that altogether?

A. Eight or ten days altogether, yes.

Q. You have not worked since about ten months ago?

A. Yes.

Mr. Donovan: That is all.

Cross-examination.

By Mr. Myers:

Q. Mr. Chapman, in 1929, when you first went to Dr. McKinney's, you saw Dr. McKinney yourself?

A. Yes.

Q. At that time did you have a cast on your foot?
A. No, sir.
Q. You had no cast on your foot?
A. No, sir.
Q. I think you testified you had a cast and it remained for six weeks.
A. Yes, I did. I didn't go there until they dismissed me from the hospital.
Q. You did not see Dr. McKinney until February, 1929?
A. I can tell you just exactly when I saw Dr. McKinney. It was some time in May.
Q. You did not see Dr. McKinney until May, 1929?
A. Yes, sir. I don't know what date, But I know it was May.
[fol. 85] Q. Then all his testimony is in error, is it?
A. It seems that we—That part is, I know. It was May when I went there.
Q. He did not see you until May, 1929?
A. Yes.
Q. How long did you go to him for treatments?
A. Well, I went there off and on for about four months.
Q. In other words, May, June and August, 1929, you went to Dr. McKinney?
A. Yes; about four months regularly I went to see him.
Q. What were you doing at his office?
A. Well, he just give me electrical treatments.
Q. Were you using crutches at the time you went to him in May, 1929?
A. Yes; I used crutches at that time.
Q. I beg your pardon?
A. I used crutches at that time.
Q. How long did you use crutches after you went to him?
A. I used them a month or so.
Q. After you went to him?
A. Yes.
Q. What sort of treatments did he give you?
A. He give me massages on my foot and electrical treatments.
Q. What sort of massage?
[fol. 86] A. I guess it was massage. He told me; I don't know what they were. He did some kind of electrical—He rubbed up and down my foot (illustrating).
Q. How often did you go to Dr. McKinney?
A. I have gone to him as much as three times a week.

Q. Up until August, 1929?

A. Yes.

Q. When did you see Dr. McKinney again after that for treatment for the foot?

A. I seen him about a month after that.

Q. In other words, in September, 1929, you saw him again?

A. Yes, sir.

Q. Did you go to him for treatments then?

A. Yes.

Q. What sort of treatment did you get from him then?

A. Same thing.

Q. When did you see him again after that?

A. I went off and on—I can't say just the time I saw him; it might have been two weeks or three weeks or a month; I can't say.

By the Deputy Commissioner:

Q. In September, you mean?

A. Yes.

By Mr. Myers:

Q. When did you see him again after that?

A. Then the next time I saw him I think I met him on the [fol. 87] street.

Q. When was that?

A. I don't know just when it was. He called me and I went and got in his car and he examined my foot; pressed down on it; he didn't do anything else.

Q. When did you see him after that?

A. Well, I didn't see him any more for a long time. I had a bad cold, and I went to him to get some medicine for a cold.

Q. When did you see him after that for your foot?

A. I didn't see him any more for my foot.

Q. In other words, after October, 1929 you did not see him for your foot?

A. October, 1929—Yes, I saw him since October, but I can't recall just when it was.

Q. Did you see him for treatments at that time?

A. Yes.

Q. How many times after October, 1929 did you see him for treatments?

A. I don't know how many times.

Q. Did anybody else treat you besides Dr. McKinney?

A. Not after I left the hospital.

Q. After you left the hospital was Dr. McKinney the only doctor attending you at that time?

A. Yes.

[fol. 88] Q. You do not know how many treatments he gave you in the latter part of the year 1929?

A. No, sir.

Q. Did he treat you in 1930?

A. Yes, sir.

Q. When did he treat you in 1930?

A. I don't know when it was, but he treated me on and off—let's see; about four months, off and on. He used to come to my house. I loved at 33 Florida Avenue.

Q. How many times did he treat you in 1930?

A. I can't say.

Q. What sort of treatments did he give you at your hours-?

A. Electrical treatments.

Q. He brought his electrical apparatus with him to treat you at your hours-?

A. Yes.

Q. Why did he come to your house?

A. Because I was feeling bad and I couldn't get out.

Q. Was that when he was treating you for this cold?

A. No; my foot.

Q. In 1930?

A. Yes.

Q. How often did you see him in the year 1930? Did he treat you?

A. I can't say how often.

[fol. 89] Q. Can you approximate how often he treated you?

A. It is hard for me to say, because I don't remember.

Q. When did he give you his last treatment?

A. I can't say that.

Q. Was it in 1930 or not?

A. Some time in 1932, I think, he give me the last treatment; I can't say; I think it was some time in 1932.

Q. Was it in 1932 that he examined you for the purpose of testifying in your trial? Isn't that what you mean by that? And not that it was your last treatment?

A. It might have been for that.

Q. He did not treat you; he examined you just before the trial for the purpose of testifying?

A. He treated me, too.

Q. What did he do for you?

A. He gave me electrical treatments.

Q. Did he give you any treatments in 1931?

A. Yes.

Q. You can't say how many treatments he gave you in 1930 and 1931, can you?

Mr. Donovan: He says he was treated; he can't remember how many times.

By Mr. Myers:

Q. What months did he treat you in?

A. I can't remember that.

[fol. 90] Q. Did you improve from your treatments? How were you feeling in the lat-er part of 1929?

A. They seemed to make me feel better for a while—two or three days—and then they would come right back on me.

Q. You do not feel any better right now than in 1931?

A. I feel much better now.

Q. When did you start feeling improved?

A. Only I have those pains through my head. I have them now at times.

Q. What did you do for the pains?

A. I take aspirins. I would have had X-rays taken, but I haven't the money.

Q. When were you married?

A. I have been married about two years.

Q. When were you married?

A. About two years ago.

Q. Before the accident? Did you marry since the accident?

A. Yes.

Q. Any children?

A. One.

Q. Born after the accident?

A. Yes.

Q. The first employment you sought after 1929 was some time in the fall of 1931, and you sought employment with the Pan-Tex cleaners?

[fol. 91] A. Yes.

Q. You worked for them how long?

A. About ten or twelve days.

Q. Two weeks or ten or twelve days?

A. Yes.

Q. The two weeks you earned $14 a week and for the ten or twelve days a dollar and a half a day?

A. Yes.

Q. You haven't sought any employment from since ten months ago?

A. Yes.

Q. Why didn't you seek any employment?

A. I wasn't able to work.

Q. You are absolutely disabled from doing any work at all?

A. The kind of work, sitting down, I couldn't get that.

Q. Did you try to do any work after you worked for the Pan-Tex cleaners?

A. That is all I tried.

Q. You did not try any other work?

A. No, sir. I could not do that; I knew I could not do the others.

Q. How long did you live at 33 Florida Avenue? Is that where you were living at the time of the accident?

A. Yes, sir.

Q. How long did you live there?

[fol. 92] A. Altogether, do you mean?

Q. When did you move away from there?

A. I moved away from there about four months after I got married—three or four months.

Q. What month of the year did you get married?

A. I can't remember that.

By the Deputy Commissioner:

Q. You do not know what day of the month you were married?

Mr. Myers: I don't care about the date; I will just be satisfied with the month of the year he was married.

The Witness: I can't remember.

By Mr. Donovan:

Q. It was after the trial of the case in the Supreme Court?

A. Yes.

Q. How long after that was it?

A. I have been married a little more than two years. About two years and two months, or something like that.

Q. You were married probably in March or April of 1932, right after the trial of that case?

A. I think it was March or April.

Q. You moved away from Florida Avenue about two months after that, which would make it up to August or September of 1932?

By Mr. Myers:

Q. Where did you move?

[fol. 93] A. 123 R Street, Northwest.

Q. 123 R Street, Northwest?

A. Yes.

Q. How much did you pay for rent there?

A. I think we was paying four dollars a month.

Q. Four dollars a month?

A. Four dollars a week.

Q. About $16 a month?

A. Yes.

Q. How long did you live at 123 R Street?

A. We lived there about six months or a year.

Q. Six months or a year? Which do you mean?

A. I don't remember just how long. I would say about that time?

Q. Where did you move from there?

A. Well, when my wife got money we moved on Quincy Place; 522 Quincy Place.

Q. Is that where you are living now?

A. Yes.

Q. What rent do you pay up there?

A. $37.50.

Q. Do you own a car now?

A. No, sir.

Q. You do not own a car at all?

A. No, sir.

[fol. 94] Q. Have you owned a car during this period of time?

A. No. sir.

Q. You have not owned any car during this period of time?

A. No, sir.

Q. You do not own a car with License No. P-865?
A. My brother.
Q. Is it in your brother's name?
A. Yes.
Q. That is listed in your brother's name or your name?
A. In his name.
Q. What sort of car is it?
A. Ford. He has not got it now. He has got a new car.

By Mr. Donovan:

Q. What is your brother's name?
A. Stephen Chapman.

By Mr. Myers:

Q. Did not you and your brother purchase a car together or two cars together during this period of time?
A. I signed for it, but it was his, in his name.
Q. The car was between you and your brother?
A. Yes.
Q. There were two cars purchased?
A. Yes.
Q. You purchased one in August, 1930, which was a Ford car?
A. Yes.
[fol. 95] Q. Then you purchased another one in July, 1931?
A. Yes.

Mr. Donovan: Wait a minute. He said he did not purchase them; he signed the contract.

By Mr. Myers:

Q. The cars were purchased and signed in your name and the title was held jointly by both of you?
A. It must have been. I don't have them.
Q. Did you ever drive a taxicab?
A. No, sir.
Q. Did you ever drive one of these cars as a taxicab?
A. No.
Q. Did you drive for your brother at all?
A. Just sometimes when we went out.
Q. Did you drive——

The Deputy Commissioner (Interposing): He said he drove it with his brother.

By Mr. Myers:

Q. Did you drive the car for your brother?
A. He drove it himself; sometimes I drive it.
Q. Did you drive it in 1930?
A. Yes, I did at times.
Q. You drove it at times in 1931?
A. Yes.
Q. These cars were sold to you and your brother, but your brother put up the money for them?
[fol. 96] A. Yes.
Q. You say you have not driven a taxicab at any time?
A. No, sir. Before the war——
Q. (Interposing): I am not talking about before the war. Since this accident you have not driven a taxicab?
A. No, sir.

Mr. Myers: That is all.

Redirect examination.

By Mr. Donovan:

Q. While you were being treated by Dr. McKinney did you pay the bills?
A. No, sir; I have — paid any bills.
Q. Did he bill you? Did he send you bills for the treatments?
A. No, sir; I do not think so.
Q. Do you know whether the bills have been paid?
A. I know that they have not, because he told me.
Q. Do you know whether he looked to you for the payment of them or not?
A. Yes.
Q. Do you know what the amount of the bills is?
A. Yes.
Q. How much are they for?
A. $91.10, he told me.

Mr. Myers: Under Section 7 of the Act, we are denying [fol. 97] liability for any medical bills.

The Deputy Commissioner: The report has not been made?

Mr. Myers: It has not. I have not ever seen the report.

Recross-examination.

By Mr. Myers:

Q. Were you examined by anybody else besides Dr. McKinney?

A. Yes.

Q. When were you examined and by whom were you examined?

A. Dr. Jack; he was here today.

Q. When did he examine you?

A. Just before I went to trial, and there was another doctor there. I don't remember his name.

Q. Do you know what he looked like?

A. Yes, sir; I know him when I seen him.

Q. What does he look like?

A. He is kind of a stout man; he has white hair.

Q. Is his name Dr. Larkin?

A. I think that is it.

Q. Did he examine you at the same time that Dr. Jack did?

A. I am not sure.

Q. It was in May, 1929. Was that the same day that Dr. Larkin examined you?

A. Yes, I think so.

Mr. Myers: I have no further questions.

Mr. Donovan: That is all.

[fol. 98] (Thereupon the witness was excused and retired from the witness stand.)

Mr. Myers: I do not know the value of having Dr. Larkin's examination, except that it shows that he examined him in May, 1929.

The Deputy Commissioner: Will Dr. Larin's testimony be cumulative with that of Dr. Hall's?

Mr. Myers: It will be, and the examination was made at the same time Dr. Jack made his; that is in May, 1929. I

would like to have this report go into the record for what it is worth.

The Deputy Commissioner: Mr. Myers; do you have the report of Dr. Larkin?

Mr. Myers: I haven't the original report; I have a carbon copy.

The Deputy Commissioner: Show it to Mr. Donovan and let us see if we can file that as being his testimony if he were here.

Mr. Myers: His testimony is practically the same as Dr. Jack's.

Mr. Donovan: That is all right.

The Deputy Commissioner: It may be marked as Respondent's Exhibit 1.

(Thereupon the paper referred to was received in evidence and marked Respondent's Exhibit 1, and is as follows:)

[fol. 99] RESPONDENT'S EXHIBIT 1

"May 4, 1929.

Isaiah Chapman, 33 Florida Avenue, N. W.

Patient states that he was injured December 16, 1927, the result of a street car accident at 4½ Street and Maine Ave. He was taken to Emergency Hospital where he was treated and returned home that night. He returned to the Emergency Hospital subsequently three or four times for treatment, and then was under the care of Dr. A. B. McKenney, colored, 1515 First Street.

His injuries consisted of fracture first right metatarsal, with dorsal deformity—2. Fracture outer table, right frontal bone. The right foot was in a cast for four weeks.

"Examination today reveals a small scar, medial surface mid-phalangeal joint, 1st metatarsal right. There is a slight deformity, but union is good, as well as all motions. There is a small scar mid-frontal regions ½ inch in diameter over the site of fracture, frontal bone. The scar is healed and not tender. The toes of both feet are moderately clawed.

Diagnosis. 1. Fracture first metatarsal, right, slight deformity.

2. Scar ½ inch in diameter, mid-frontal region, non-tender, non-adherent and non-productive of symptoms.

Opinion. The fracture of the large toe is healed, and it is my opinion that the patient will suffer from no permanent disability. The fracture of the outer table, right frontal bone is healed, with no permanent disability, except [fol. 100] the slight disfigurement from above mentioned scar, which is permanent.

Dr. A. B. McKinney, who was present at this examination has concurred in these findings.

(Signed) Edward Larkin.

The Deputy Commissioner: All right, the hearing is concluded.

(Thereupon, the instant hearing was closed.)

I hereby certify that the foregoing is a complete and accurate transcript of the shorthand report of the proceedings had and testimony presented at the described hearing, made by Nicholas Cinciotta, a competent shorthand reporter and a member of my staff.

H. S. Middlemiss, Official Reporter.

[fol. 101] In Supreme Court of District of Columbia

Motion of Robert J. Hoage to Dismiss Bill

Filed July 27, 1934

* * * * * * *

Now comes the defendant, Robert J. Hoage, deputy commissioner, United States Employees' Compensation Commission, by his attorneys, and moves this Honorable Court to dismiss the bill of complaint filed herein for the following reasons:

1. That the bill of complaint filed herein does not state a cause of action and does not entitle the plaintiff to any relief in law or equity.

2. That the bill of complaint with exhibits, including the transcripts of testimony of the hearings before the deputy

commissioner on April 26 and June 8, 1934, made a part of the bill by stipulation, shows that the compensation order of June 27, 1934, complained of in the bill, and made a part thereof as plaintiff's exhibit "D", is in accordance with law.

3. For such other good and sufficient reasons as may be shown.

Leslie C. Garnett, United States Attorney. John J. Wilson, Assistant United States Attorney, Attorneys for Defendant R. J. Hoage.

In Supreme Court of District of Columbia

Stipulation as to Exhibits "E" and "F" to Bill of Complaint

* * * * * * *

The Plaintiff and Defendant in the above-entitled action stipulate and agree to consider the transcripts of the testimony taken before Robert J. Hoage, Deputy Commissioner, United States Employees' Compensation Commission, on April 26, 1934, and on June 8, 1934, in the case of Isaac [fol. 102] Chapman v. The Palais Royal, Inc., Employer, and The Indemnity Insurance Company of North America, Insurance Carrier, Case No. 285-14 as exhibits to the bill of complaint filed herein, said transcripts of testimony to be identified as plaintiff's exhibits "E" and "F", respectively and prayed to be read as part of the bill of the Plaintiff herein.

James P. Donovan, Attorney for Plaintiff; Leslie C. Garnett, United States Attorney; John J. Wilson, Assistant United States Attorney, Attorneys for Defendant R. J. Hoage.

Memorandum re Intervention

August 6, 1934.—Motion of Indemnity Insurance Company for Leave to Intervene and Order granting same filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

INTERVENER'S MOTION TO DISMISS BILL

Filed September 7, 1934.

* * * * * * *

Comes now the intervener, Indemnity Insurance Company of North America, a corporation, by its attorneys, and moves this Honorable Court to dismiss the bill of complaint filed herein for the following reasons:

1. That the bill of complaint filed herein does not state a cause of action and does not entitle the plaintiff to any relief in law or equity.

2. That the bill of complaint with exhibits, including the transcripts of testimony of the hearings before the deputy commissioner on April 26 and June 8, 1934, made a part of [fol. 103] the bill by stipulation, shows that the compensation order of June 27, 1934, complained of in the bill, and made a part thereof as plaintiff's exhibit "D", is in accordance with law.

3. If the construction placed upon the compensation law by plaintiff be adopted, then the employer and insurance carrier would be deprived of substantial rights and of due process of law in that said employer would be prohibited from exercising his right of subrogation as granted by the compensation statute and this statutory right left wholly to the determination and/or whim of the employee in his pursuance of the third party remedy.

4. For such other good and sufficient reasons as may be shown.

Frost, Myers & Towers, Attorneys for Intervener.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION RE AMENDMENT OF BILL OF COMPLAINT

Filed November 1, 1934

* * * * * * *

It is duly stipulated by and between the parties hereto through their respective attorneys of record that para-

graph nine (9) of the bill of complaint filed herein, beginning with the second sentence in said paragraph, "Thereafter on the ninth day of May, 1934, etc.," and paragraph ten (10) be and the same is hereby stricken and in lieu thereof the following be and the same is hereby substituted:

"Thereafter, on, to wit, May 9, 1934, said motion coming on for hearing was denied by the Court and plaintiff thereupon through his attorneys of record by Præcipe duly filed in said cause discontinued said action against the Washington Railway & Electric Company, which action plaintiff [fol. 104] avers and says finally terminated said action."

Harlan Wood, James P. Donovan (HW), Attorneys for the Plaintiff, Isaac Chapman.

October 30, 1934.

J. J. Wilson, Ass't United States Attorney, Attorney for the Defendant, R. J. Hoage.

Frost, Myers & Towers, Attorneys for the Intervening Defendant, Indemnity Insurance Company of North America.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

FINAL DECREE

Filed November 19, 1934

* * * * * * *

This cause having come on to be heard upon the motions of the defendants to dismiss the bill of complaint, and, after argument by counsel for both parties, having been considered by the Court, it is by the Court this 19th day of November, 1934,

Adjudged, ordered and decreed, that the motions of the defendants to dismiss the bill of complaint be, and the same are hereby granted, and the said bill of complaint be, and the same is hereby dismissed.

F. Dickinson Letts, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

NOTATION OF APPEAL

Filed December 4, 1934

* * * * * * *

The plaintiff, by his attorneys of record in the above entitled cause, notes an appeal to the Court of Appeals from the decree passed herein on, to wit, November 19, [fol. 105] 1934, and cost bond is hereby fixed in the penal sum of one hundred dollars ($100.00).

F. Dickinson Letts, Justice.

J. P. Donovan, Harlan Wood, Attorneys for Plaintiff, Isaac Chapman.

Citation is hereby waived.

J. J. Wilson, Ass't United States Attorney, Attorney for Defendant, R. J. Hoage.

Frost, Myers & Towers, Attorneys for the Intervening Defendant, Indemnity Insurance Company of North America.

Let the plaintiff prosecute his appeal and further proceedings in this Court without the prepayment of costs.

F. Dickinson Letts, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS

Filed December 6, 1934

* * * * * * *

The plaintiff, Isaac Chapman, respectfully assigns as errors committed by the Court as follows:

1. The Court erred in holding that the plaintiff had abandoned his suit against a third party.

2. The Court erred in holding that the plaintiff's suit against a third party was dismissed because of his failure to prosecute it.

3. The Court erred in not holding that the plaintiff had by his election to sue a third party had not finally and completely determined his cause of action against the third party.

4. The Court erred in holding that the rights of plain-
[fol. 106] tiff's employer had been prejudiced by any act of omission or commission on plaintiff's part.

5. The Court erred in not holding that plaintiff's employer and the insurance carrier had not been prejudiced in their rights of action against a third party.

6. The Court erred in holding that the plaintiff had allowed the running of the statute of limitations, thereby prejudicing any rights of plaintiff's employer.

7. The Court erred in holding that the right of subrogation of the employer and the insurance carrier had been prejudiced by the prosecution and final discontinuance of the plaintiff's suit against a third party.

8. The Court erred in failing to give the plaintiff the presumption accorded him under section 20 (a) of the Longshoremen's Act.

9. The Court erred in denying the right of the plaintiff to compensation within the meaning and interpretation of the provisions of the Longshoremen's Act.

10. The Court erred in holding that the findings of fact of the Deputy Commissioner, dated June 27, 1934, were in accordance with fact and law.

11. The Court erred in dismissing plaintiff's Bill of Complaint.

Harlan Wood, J. P. Donovan, Attorneys for Plaintiff.

Service of a copy of the foregoing assignment of errors is acknowledged this 5th day of December, 1934.

J. J. Wilson, Ass't United States Attorney; Frost, Myers & Towers, Intervener.

[fol. 107] IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD

Filed December 6, 1934

* * * * * * *

The Clerk of the Court will please prepare and include in the transcript of record on appeal for the appellant in the above entitled cause the following:

1. The plaintiff's Bill for Mandatory Injunction with exhibits attached thereto.
2. Memo: Plaintiff's affidavit in forma pauperis.
3. Plaintiff's exhibits "E" and "F".
4. Plaintiff's stipulation amending Bill of Complaint, dated October 30, 1934 and filed Nov. 1, 1934.
5. Memo; Motion and order allowing Indemnity Insurance Company of North America to intervene.
6. Motion of defendant, Hoage, to dismiss Bill of Complaint.
7. Motion of intervener, Indemnity Insurance Company of North America, to dismiss plaintiff's Bill of Complaint.
8. Final decree granting motion of defendant and intervener dismissing plaintiff's Bill of Complaint.
9. Memo: Notation of Appeal and order allowing prosecution of suit in forma pauperis.
10. Plaintiff's assignment of errors.
11. This Designation.

Harlan Wood, J. P. Donovan, Attorneys for Plaintiff.

Service of a copy of the foregoing is accepted this 5th day of December, 1934.

J. J. Wilson, Ass't United States Attorney; Frost, Myers & Towers, Intervener.

[fol. 108] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 109] [File endorsement omitted.]

[fols. 110 & 111] Minute entries of argument, April 9th and 10th, 1935, omitted in printing.

[fol. 112] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6412

(Argued April 9, 1935. Decided May 13, 1935)

ISAAC CHAPMAN, Appellant

v.

ROBERT J. HOAGE, Deputy Commissioner, District of Columbia Compensation District, United States Employees' Compensation Commission, and Indemnity Insurance Company of North America, a Corporation, intervener

Appeal From the Supreme Court of the District of Columbia

Harlan Wood, James P. Donovan, of Washington, D. C., for appellant.

Leslie C. Garnett, John J. Wilson, for Hoage; Norman B. Frost, Frank H. Myers, all of Washington, D. C., for appellee, Indemnity Ins. Co.

(Before Martin, Chief Justice; Robb, Van Orsdel, Hitz, and Groner, Associate Justices.)

OPINION

VAN ORSDEL, Associate Justice:

Appellant, plaintiff below, appeals from a final decree dismissing his bill of complaint for a mandatory injunction, filed under the provisions of the District of Columbia workmen's compensation law,[1] against defendant Hoage, Deputy Commissioner of the United States Employees' Compensation Commission. The Indemnity Insurance Company of North America was permitted to intervene. For convenience, appellant will be referred to as plaintiff, the appellee as defendant, and the Insurance Company as intervener.

---

[1] Longshoremen's and Harbor Workers' Compensation Act (act of March 4, 1927, 44 Stat. 1424), as made applicable to the District by the act of May 17, 1928 (45 Stat. 600).

It appears that plaintiff sustained injuries on December 5, 1928, while employed by the Palais Royal Company of Washington, D. C., as a helper on a delivery truck, for which the intervener was the insurance carrier. On June 10, 1929, plaintiff filed with defendant a notice of his election to sue a third party, namely, the Washington Railway [fol. 113] & Electric Company. Suit was instituted July 18, 1929; and on trial in the Supreme Court of the District plaintiff obtained a judgment for $3,000 against the third party. On appeal the judgment was reversed by this court. Washington Railway & Electric Company v. Chapman, 62 App. D. C. 140. An application to the Supreme Court of the United States for a writ of certiorari was denied October 9, 1933. The mandate of this court reversing the judgment was accordingly transmitted to the Supreme Court of the District.

Plaintiff then requested a hearing on his claim for deficiency compensation, and the matter was heard before the Deputy Commissioner on April 26, 1934. At this hearing the insurance company raised the question of jurisdiction on the ground that plaintiff had not pursued his third party remedy to final judgment. The deputy commissioner continued the hearing without a definite ruling, intimating however his approval of the position taken by the insurance company. Plaintiff then filed a motion in the railway company suit to proceed further "without payment of accrued or future costs" for the purpose of having this cause "determined as a matter of record." This motion was denied by the court.

Plaintiff, instead of proceeding to a new trial and securing a final judgment, petitioned the court to proceed in forma pauperis. His petition was denied, and he took no further steps to secure his right to thus proceed to a new trial. The denial of the right to proceed in forma pauperis did not amount to a final judgment either in that matter, or in the suit against the railway company. The court doubtless denied the petition on the theory that, in view of the decision in the appellate court, further proceedings against the railway company would be fruitless; but notwithstanding the apparent obstacle to success, plaintiff, if he had insisted on his rights, was entitled to a new trial.

Abandoning this step to procure a final judgment, plaintiff, on March 1, 1934, renewed his application for compensation. Hearings were had, and on June 27, 1934, defend-

ant denied plaintiff compensation on the ground "that the claimant, having filed his election to pursue his remedy against the third party, and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had, and the claimant therefore is not entitled to compensation within the meaning of the act."

On May 9, 1934, the plaintiff by præcipe duly filed, discontinued his action against the Washington Railway & Electric Company and filed his bill in equity for a review of the award and for a mandatory injunction against defendant Commissioner. Whereupon defendant Hoage moved to dismiss the bill on the ground that his compensation order of June 27, 1934, complained of in the bill, is in accordance with law. The intervener joined in the motion of defendant to dismiss. The court, on hearing, entered a decree dismissing plaintiff's bill, and from the decree this appeal was taken.

Plaintiff elected to proceed under section 33 of the Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1440, which provides as follows:

"SECTION 33. [(a)] If on account of a disability or death for which compensation is payable under this act the person [fol. 114] entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

* * * * * * *

"(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this act a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person.

"(g) If a compromise with such third person is made by the person entitled to compensation or such representative

of an amount less than the compensation to which such person or representative would be entitled to under this act, the employer shall be liable for compensation] as determined in subdivision (e) [only if such compromise is made with his written approval."]

The statute of limitations having run in favor of the employer and the insurance carrier, plaintiff was required to pursue his action against the railway company to a final judgment. Not having done this, plaintiff is in no position now to seek compensation through defendant commissioner. Counsel for defendant relies chiefly upon decisions of the New York courts where the statute is substantially similar to the Federal statute here involved. These courts take the extreme position that plaintiff having elected to pursue the third party, could not under any circumstances discontinue that case before final judgment, without the consent of the employer and carrier, and thereafter claim compensation. Kavanaugh v. Belden, 231 App. Div. 412; Breital v. Hinderstein et al., 236 App. Div. 203, 258 N. Y. S. 237; Cole v. Gold Metal Cone Co., 258 N. Y. S. 239.

With this construction of the statute we are not in agreement. The New York statute contains the provision that an injured employee "shall, before any suit or any award under this chapter, elect either to take compensation under this chapter or to pursue remedy against such other" third person. This provision, compelling election, is not contained in the Longshoremen's Act. It furnishes, however, a remote basis for the extreme holding of the New York courts in interpreting their act.

This distinction between the Federal statute and the New York statute is clearly stated by the Circuit Court of Appeals of the Second Circuit in the recent case of American Lumbermans' Mutual Casualty Company v. Lowe, Deputy Commissioner, et al., 70 Fed. (2d) 616. In that case the plaintiff elected to bring an action against the third party, but later, and before the statute of limitations had run, discontinued her suit and proceeded for compensation before the Commissioner. Her right to proceed before the Commissioner, not having pursued her case against the third party to final judgment, was denied by the District Court on the authority of the New York decisions. The Court of Appeals, however, held, and we think properly, that so long as the rights of the employer or carrier had not been preju-

[fol. 115] diced by the running of the statute of limitations, the act of discontinuance would not prevent the plaintiff from pursuing her remedy before the Commissioner.

On this point the court said: "It is evident that either an acceptance of compensation under (b) or a compromise with a third person and without written consent of the employer under (g) constitutes a final election that will bar other remedies. But there is nothing in (a) suggesting that bringing an action against the third person amounts to a final election. Nor, in the absence of such delay as will prevent the employer or its carrier from effectively availing themselves of their rights against the third person by way of subrogation, would there seem to be adequate reason for depriving a person entitled to compensation of the right to discontinue her action and seek compensation under the statute. Such a locus poenitentiae is ordinarily available, where separate remedies against different persons exist."

The present case, however, is in conflict with the exception laid down in the Lowe case, since the running of the statute of limitations intervened, while the suit for damages was pending against the railway company. The election of plaintiff to bring suit against the third party, and his failure to pursue that remedy to final judgment, with the intervention of limitations, bars his right to recover compensation under the statute.

The decree is affirmed.

Josiah A. Van Orsdel, Associate Justice.

Dissenting Opinion

Groner, J., dissenting: I am unable to agree in the conclusion of the court.

Petitioner (appellant) was employed by the Palais Royal Company of Washington as a helper on a delivery truck. Intervener was the insurance carrier. Petitioner was injured in the course of his employment—there was a collision between his truck and a street car—and elected to sue the alleged third party wrongdoer. In apt time he filed with the Deputy Commissioner notice of his election and of his purpose to claim any deficiency between the amount recovered and the amount he might be entitled to receive under the Compensation Act. This was all done in exact accordance with the provisions of the act.

On the trial of his action against the street railroad company he obtained a verdict for damages, on which judgment was entered. On appeal, we reversed the judgment, and certiorari was thereafter denied by the Supreme Court. Petitioner then made application to the Deputy Commissioner for compensation. The employer and the insurance carrier (intervener) answered and objected to an award on the ground that the deputy had no jurisdiction because petitioner had not exhausted his third party remedy. At this point, the record shows that the deputy, obviously in doubt, adjourned the hearing until the question of "court procedure" was definitely determined.

Petitioner thereafter, through his attorneys, moved the Supreme Court of the District to allow him to proceed in the law action without the payment of costs, alleging in sup- [fol. 116] port of the motion that he had been unable to work since his injury and was without the means of paying the costs of the litigation. The judge of the lower court before whom the action was pending denied the motion—I have no doubt, only because he considered the further prosecution of the action bootless, and suggested that petitioner claim compensation under the act. Petitioner thereupon submitted an order of discontinuance, which was entered, and he again applied to the deputy for compensation. At the conclusion of this hearing the deputy entered an order refusing his application on the ground that petitioner not having prosecuted his third-party remedy to completion, i. e., having discontinued his third-party action, and the statute of limitations having run, the rights of the employer to subrogation were prejudiced and petitioner's right to compensation lost.

Petitioner then applied to the Supreme Court of the District for a mandatory injunction, which being refused, he appealed to this court.

I think the writ should issue. The statute (Act of March 4, 1927, Sec. 33; 33 U. S. C. A., Sec. 933) provides:

"(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Commission determines is

payable on account of such injury or death over the amount recovered against such third person.

"(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

Other than subsection (g), supra, there is no provision in the statute which makes final the election of the injured to pursue the third party remedy, and in that section the penalty is confined to cases of unauthorized compromise; so that the effect of our decision is to hold—wholly outside any express provision of the act—that if the dismissal against the third party results in prejudicing the rights of the employer, the latter cannot be required to pay compensation. Some of the cases cited in the opinion sustain this view. But even if the proposition is conceded, I can find in this record no facts to justify its application. On the contrary, the record, as I view it, shows affirmatively that the dismissal of the action did not and could not prejudice the employer or the insurance carrier, and this, for the simple reason that they lost nothing by it.

By reference to our opinion in the damage suit it will be seen that our reversal was on the merits and that we held, first, that petitioner was guilty of contributory negligence and, secondly, that the street railroad company was guilty of no negligence at all. It is true we remanded the case to the Supreme Court of the District for a new trial, as we are required to do, but it is perfectly obvious from the language of the opinion that our decision was to all intents and purposes a final adjudication against the right to recover. [fol. 117] While, therefore, it may be correctly said that the litigation begun by petitioner against the third party was not technically concluded untll further proceedings were had in the trial court, such proceedings, if had, must necessarily have gone against petitioner except in the event he was able to make out a wholly different case; and the record in the hearings before the deputy shows nothing on which to base even a conjecture to that effect but, on the other hand, shows that his main witness—the driver of the truck

at the time of the collision—was no longer available because of his death.

[In these circumstances, unless the whole purpose of the act be disregarded, the burden of showing loss or damage through the dismissal of the action ought to be placed on the insurer; for unless damage to it is shown, petitioner's right to discontinue the third party action and claim compensation is unchallenged. To be discharged of his statutory obligation, the employer must show, not only the dismissal of the third party action and the loss thereby of its right of subrogation but, in my view, must go further and show that the lost right of subrogation resulted in damage to the employer. Here there is no proof of any actual damage but, on the contrary, an inescapable conclusion there was none.

Judge Hitz concurs in this dissent.

A true copy. Test:

——, Clerk, United States Court of Appeals for the District of Columbia.

[fol. 118] In United States Court of Appeals for District of Columbia, April Term, 1935

No. 6412

Isaac Chapman, Appellant,

vs.

R. J. Hoage, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, and Indemnity Insurance Company of North America, a Corporation, Intervener

Decree—May 13, 1935

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 13, 1935.

Dissenting Opinion by Mr. Justice Groner concurred in by Mr. Justice Hitz.

[fol. 119] IN UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[Title omitted]

ORDER STAYING MANDATE—May 29, 1935

On consideration of the motion for a stay of the mandate herein, pending application for certiorari, It is ordered by the Court that the mandate be and it hereby is, stayed for 30 days under Rule 24.

[fol. 120] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed May 27, 1935

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. The opinions of the Court of Appeals.
4. Judgment of the Court.
5. Minute entry showing motion to stay proceedings pending application for writ of certiorari.
6. This designation.
7. The certificate of the Clerk of the Court of Appeals.

Harlan Wood, J. P. Donovan, Attorneys for Isaac Chapman.

[fol. 121] Service of a copy of designation of record is acknowledged this — day of May 1935.

Leslie C. Garnett, U. S. Atty., Frost, Myers & Towers, Attorneys for Appellees.

[fol. 122] [File endorsement omitted.]

[fol. 123] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 124] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,705. District of Columbia, U. S. Court of Appeals. Term No. 151. Isaac Chapman, Petitioner, vs. R. J. Hoage, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission et al. Petition for a writ of certiorari and exhibit thereto. Filed June 21, 1935. Term No. 151 O. T. 1935.